CASES ILLUSTRATING GENERAL PRINCIPLES OF THE LAW OF CONTRACT

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PREFACE

This collection of cases was begun in the lifetime of the late Sir William Anson and with his approval, in the hope that it might prove a useful companion volume to his book on the *Law of Contract*; and this purpose has largely determined the choice of cases and the order of their arrangement. The present editor of Sir William Anson's book, Mr. M. L. Gwyer, C.B., Legal Adviser to the Ministry of Health, has also expressed his approval of our plan.

Our chief difficulty has been to decide, not on the cases that we desired, but on those that the limitations of our space allowed us to print; and we can hardly hope to avoid criticism for the omission of many cases which might usefully have been included. We have endeavoured to select, from among the wealth of material in our English reports, only cases which seemed to us to have the highest educational value. Some of the most familiar cases on the law of contract, leading cases by reason of the importance of the point of law which they decided, when judged by this test, appeared to us not wholly suitable for inclusion. In some the original judgement gave little more instruction than the statement of its effect in a text-book; in others the issue, for the sake of which we could have wished to include the case, was only one of several arising on the facts, and it would have been necessary for us, contrary to the plan we had adopted, to abridge the judgement. We have also occasionally felt ourselves justified

in omitting a case, otherwise suitable, which appeared to us to be so fully stated in Sir William Anson's book that the student would derive little further benefit from the original report.

We might easily have included more cases had we not thought it desirable to print at least one judgement without any omissions from every case; but we believe that much of the benefit that a student may derive from reading the reports at first hand depends on his learning to extract for himself, as he will later have to do in practice, the *ratio decidendi*, instead of having this done for him by omissions of the less material parts of a judgement, or even by headnotes. This conviction also explains the plan which we have adopted in the note prefixed to each case, which is intended, not as an analysis, but rather as an indication of the general subject-matter of the case which it precedes.

We have to thank the Incorporated Council of Law Reporting, Messrs. Stevens & Sons, Limited, the proprietors of the *Law Journal* and *English Reports*, and the proprietors of the *Law Times Reports*, for kindly giving us permission to reprint cases from their respective series of reports.

J. C. M.
J. L. B.

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OFFER AND ACCEPTANCE

'Verborum obligatio constat si inter contrahentes id agatur.' Digest xliv, 7, 3, § 2.

BALFOUR *v.* BALFOUR [1919] 2 K. B. 571

APPEAL from a decision of Sargant J., sitting as an additional judge of the King's Bench Division.

The plaintiff sued the defendant (her husband) for money which she claimed to be due in respect of an agreed allowance of 30*l.* a month. The alleged agreement was entered into under the following circumstances. The parties were married in August, 1900. The husband, a civil engineer, had a post under the Government of Ceylon as Director of Irrigation, and after the marriage he and his wife went to Ceylon, and lived there together until the year 1915, except that in 1906 they paid a short visit to this country, and in 1908 the wife came to England in order to undergo an operation, after which she returned to Ceylon. In November, 1915, she came to this country with her husband, who was on leave. They remained in England until August, 1916, when the husband's leave was up and he had to return. The wife however on the doctor's advice remained in England. On August 8, 1916, the husband being about to sail, the alleged parol agreement sued upon was made. The plaintiff, as appeared from the judge's note, gave the following evidence of what took place: 'In August, 1916, defendant's leave was up. I was suffering from rheumatic arthritis. The doctor advised my staying in England for some months, not to go out till November 4. On August 8 my husband sailed. He gave me a cheque from 8th to 31st for 24*l.*, and promised to give me 30*l.* per month till I returned.' Later on she said: 'My husband and I wrote the figures together on August 8; 34*l.* shown. Afterwards he said 30*l.*' In cross-examination she said that they had not agreed to live apart until subsequent differences arose between them, and that the agreement of August, 1916, was one which might be made by a couple in amity. Her husband in

BALFOUR v. BALFOUR. consultation with her assessed her needs, and said he would send 30*l.* per month for her maintenance. She further said that she then understood that the defendant would be returning to England in a few months, but that he afterwards wrote to her suggesting that they had better remain apart. In March, 1918, she commenced proceedings for restitution of conjugal rights, and on July 30 she obtained a decree nisi. On December 16, 1918, she obtained an order for alimony.

Sargant J. held that the husband was under an obligation to support his wife, and the parties had contracted that the extent of that obligation should be defined in terms of so much a month. The consent of the wife to that arrangement was a sufficient consideration to constitute a contract which could be sued upon.

He accordingly gave judgment for the plaintiff.

The husband appealed.

ATKIN, L.J.—The defence to this action on the alleged contract is that the defendant, the husband, entered into no contract with his wife, and for the determination of that it is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife. It is quite common, and it is the natural and inevitable result of the relationship of husband and wife, that the two spouses should make arrangements between themselves—agreements such as are in dispute in this action—agreements for allowances, by which the husband agrees that he will pay to his wife a certain sum of money, per week, or per month, or per year, to cover either her own expenses or the necessary expenses of the household and of the children of the marriage, and in which the wife promises either expressly or impliedly to apply the allowance for the purpose for which it is given. To my mind those agreements, or many of them, do

not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement. The consideration, as we know, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. That is a well-known definition, and it constantly happens, I think, that such arrangements made between husband and wife are arrangements in which there are mutual promises, or in which there is consideration in form within the definition that I have mentioned. Nevertheless they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences. To my mind it would be of the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the Courts. It would mean this, that when the husband makes his wife a promise to give her an allowance of 30*s.* or 2*l.* a week, whatever he can afford to give her, for the maintenance of the household and children, and she promises so to apply it, not only could she sue him for his failure in any week to supply the allowance, but he could sue her for non-performance of the obligation, express or implied, which she had undertaken upon her part. All I can say is that the small Courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations. They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts. The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop, and the principles of the common law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code. The parties themselves are advocates, judges, Courts, sheriff's officer

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and reporter. In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted. The only question in this case is whether or not this promise was of such a class or not. For the reasons given by my brethren it appears to me to be plainly established that the promise here was not intended by either party to be attended by legal consequences. I think the onus was upon the plaintiff, and the plaintiff has not established any contract. The parties were living together, the wife intending to return. The suggestion is that the husband bound himself to pay 30*l.* a month under all circumstances, and she bound herself to be satisfied with that sum under all circumstances, and, although she was in ill-health and alone in this country, that out of that sum she undertook to defray the whole of the medical expenses that might fall upon her, whatever might be the development of her illness, and in whatever expenses it might involve her. To my mind neither party contemplated such a result. I think that the parol evidence upon which the case turns does not establish a contract. I think that the letters do not evidence such a contract, or amplify the oral evidence which was given by the wife, which is not in dispute. For these reasons I think the judgment of the Court below was wrong and that this appeal should be allowed.

WARRINGTON and DUKE, L.JJ., delivered judgments to the same effect.

Appeal allowed.

CARLILL v. CARBOLIC SMOKE BALL COMPANY.

'I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound. If a man sent an offer abroad saying: I wish to know whether you will supply me with goods at such and such a price, and, if you agree to that, you must ship the first cargo as soon as you get this letter, there can be no doubt that as soon as the cargo was shipped the contract would be complete, and if the cargo went to the bottom of the sea, it would go to the bottom of the sea at the risk of the orderer.'—Per Lord Blackburn in *Brogden* v. *Metropolitan Railway Co.* (1877) 2 App. Cas. at p. 691.

CARLILL v. CARBOLIC SMOKE BALL COMPANY [1893] 1 Q. B. 256 (C. A.)

Appeal from a decision of Hawkins, J. ([1892] 2 Q. B. 484).

The defendants, who were the proprietors and vendors of a medical preparation called 'The Carbolic Smoke Ball', inserted in the *Pall Mall Gazette* of November 13, 1891, and in other newspapers, the following advertisement: '100*l.* reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. 1000*l.* is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.

'During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

'One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10*s.*, post free. The ball can be refilled at a cost of 5*s.* Address, Carbolic Smoke Ball Company, 27, Princes Street, Hanover Square, London.'

The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's, and used it as directed, three times a day, from November 20, 1891, to January 17, 1892, when she was attacked by influenza. Hawkins, J., held that she was entitled to recover the 100*l.* The defendants appealed.

LINDLEY, L.J.—I will begin by referring to two points which were raised in the Court below. I refer to them simply for the purpose of dismissing them. First, it is said no action will lie upon this contract because it is a policy. You have only to look at the advertisement to dismiss that suggestion. Then it was said that it is a bet. Hawkins, J., came to the conclusion that nobody ever dreamt of a bet, and that the transaction had nothing whatever in common with a bet. I so entirely agree with him that I pass over this contention also as not worth serious attention.

Then, what is left? The first observation I will make is that

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we are not dealing with any inference of fact. We are dealing with an express promise to pay 100*l.* in certain events. Read the advertisement how you will, and twist it about as you will, here is a distinct promise expressed in language which is perfectly unmistakable—'100*l.* reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the influenza after having used the ball three times daily for two weeks according to the printed directions supplied with each ball.'

We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff? My answer to that question is No, and I base my answer upon this passage: '1000*l.* is deposited with the Alliance Bank, shewing our sincerity in the matter'. Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in aid by the advertiser as proof of his sincerity in the matter—that is, the sincerity of his promise to pay this 100*l.* in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it.

Then it is contended that it is not binding. In the first place, it is said that it is not made with anybody in particular. Now that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the conditions accepts the offer. In point of law this advertisement is an offer to pay 100*l.* to anybody who will perform these conditions, and the performance of the conditions is the acceptance of the offer. That rests upon a string of authorities, the earliest of which is *Williams* v. *Carwardine* (4 B. & Ad. 621),[1] which has been followed by many other decisions upon advertisements offering rewards.

But then it is said, 'Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought

[1] For the facts of this case see Anson. It appears, however, from the collateral report of the case in 5 C. & P. 574 that counsel for the defendant admitted that the plaintiff knew of the offer at the time of making the disclosure. [Edd.]

to have been notified.' Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified. But is that so in cases of this kind? I apprehend that they are an exception to that rule, or, if not an exception, they are open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required—which I doubt very much, for I rather think the true view is that which was expressed and explained by Lord Blackburn in the case of *Brogden* v. *Metropolitan Ry. Co.* (2 App. Cas. 666, 691)—if notice of acceptance is required, the person who makes the offer gets the notice of acceptance contemporaneously with his notice of the performance of the condition. If he gets notice of the acceptance before his offer is revoked, that in principle is all you want. I, however, think that the true view, in a case of this kind, is that the person who makes the offer shews by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance.

We, therefore, find here all the elements which are necessary to form a binding contract enforceable in point of law, subject to two observations. First of all it is said that this advertisement is so vague that you cannot really construe it as a promise—that the vagueness of the language shews that a legal promise was never intended or contemplated. The language is vague and uncertain in some respects, and particularly in this, that the 100*l.* is to be paid to any person who contracts the increasing epidemic after having used the balls three times daily for two weeks. It is said, When are they to be used? According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who has made it, one might infer that any time was meant. I do not think that was meant, and to hold the contrary would be pushing too far the doctrine of taking language most strongly against the person using it. I do not think that business people or reasonable people would understand the words as meaning that if you took a smoke ball and used it three times daily for two weeks you were to be guaranteed against influenza for the rest of your life, and I think

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it would be pushing the language of the advertisement too far to construe it as meaning that. But if it does not mean that, what does it mean? It is for the defendants to shew what it does mean; and it strikes me that there are two, and possibly three, reasonable constructions to be put on this advertisement, any one of which will answer the purpose of the plaintiff. Possibly it may be limited to persons catching the 'increasing epidemic' (that is, the then prevailing epidemic), or any colds or diseases caused by taking cold, during the prevalence of the increasing epidemic. That is one suggestion; but it does not commend itself to me. Another suggested meaning is that you are warranted free from catching this epidemic, or colds or other diseases caused by taking cold, whilst you are using this remedy after using it for two weeks. If that is the meaning, the plaintiff is right, for she used the remedy for two weeks and went on using it till she got the epidemic. Another meaning, and the one which I rather prefer, is that the reward is offered to any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball. Then it is asked, What is a reasonable time? It has been suggested that there is no standard of reasonableness; that it depends upon the reasonable time for a germ to develop! I do not feel pressed by that. It strikes me that a reasonable time may be ascertained in a business sense and in a sense satisfactory to a lawyer, in this way; find out from a chemist what the ingredients are; find out from a skilled physician how long the effect of such ingredients on the system could be reasonably expected to endure so as to protect a person from an epidemic or cold, and in that way you will get a standard to be laid before a jury, or a judge without a jury, by which they might exercise their judgment as to what a reasonable time would be. It strikes me, I confess, that the true construction of this advertisement is that 100*l.* will be paid to anybody who uses this smoke ball three times daily for two weeks according to the printed directions, and who gets the influenza or cold or other diseases caused by taking cold within a reasonable time after so using it; and if that is the true construction, it is enough for the plaintiff.

I come now to the last point which I think requires attention—that is, the consideration. It has been argued that this is nudum pactum—that there is no consideration. We must apply to that

argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows. It is quite obvious that in the view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.

But there is another view. Does not the person who acts upon this advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise.

We were pressed upon this point with the case of *Gerhard* v. *Bates* (2 E. & B. 476), which was the case of a promoter of companies who had promised the bearers of share warrants that they should have dividends for so many years, and the promise as alleged was held not to shew any consideration. Lord Campbell's judgment when you come to examine it is open to the explanation, that the real point in that case was that the promise, if any, was to the original bearer and not to the plaintiff, and that as the plaintiff was not suing in the name of the original bearer there was no contract with him. Then Lord Campbell goes on to enforce that view by shewing that there was no consideration shewn for the promise to him. I cannot help thinking that Lord Campbell's observations would have been very different if the plaintiff in that action had been an original bearer, or if the declaration had gone on to shew what a société anonyme was, and had alleged the promise to have been, not only to the first bearer, but to anybody who should become the bearer. There was no such allegation, and the Court said, in the absence of such allegation, they

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did not know (judicially, of course) what a société anonyme was, and, therefore, there was no consideration. But in the present case, for the reasons I have given, I cannot see the slightest difficulty in coming to the conclusion that there is consideration. It appears to me, therefore, that the defendants must perform their promise, and, if they have been so unwary as to expose themselves to a great many actions, so much the worse for them.

BOWEN, L.J.—I am of the same opinion. We were asked to say that this document was a contract too vague to be enforced. The first observation which arises is that the document itself is not a contract at all, it is only an offer made to the public. The defendants contend next, that it is an offer the terms of which are too vague to be treated as a definite offer, inasmuch as there is no limit of time fixed for the catching of the influenza, and it cannot be supposed that the advertisers seriously meant to promise to pay money to every person who catches the influenza at any time after the inhaling of the smoke ball. It was urged also, that if you look at this document you will find much vagueness as to the persons with whom the contract was intended to be made—that, in the first place, its terms are wide enough to include persons who may have used the smoke ball before the advertisement was issued ; at all events, that it is an offer to the world in general, and, also, that it is unreasonable to suppose it to be a definite offer, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense. It is also contended that the advertisement is rather in the nature of a puff or a proclamation than a promise or offer intended to mature into a contract when accepted. But the main point seems to be that the vagueness of the document shews that no contract whatever was intended. It seems to me that in order to arrive at a right conclusion we must read this advertisement in its plain meaning, as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it ? It was intended unquestionably to have some effect, and I think the effect which it was intended to have, was to make people use the smoke ball, because the suggestions and allegations which it

contains are directed immediately to the use of the smoke ball as distinct from the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly, or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the use of it should be increased. The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic after using the ball. It has been said that the words do not apply only to persons who contract the epidemic after the publication of the advertisement, but include persons who had previously contracted the influenza. I cannot so read the advertisement. It is written in colloquial and popular language, and I think that it is equivalent to this : ' 100*l.* will be paid to any person who shall contract the increasing epidemic after having used the carbolic smoke ball three times daily for two weeks.' And it seems to me that the way in which the public would read it would be this, that if anybody, after the advertisement was published, used three times daily for two weeks the carbolic smoke ball, and then caught cold, he would be entitled to the reward. Then again it was said : ' How long is this protection to endure ? Is it to go on for ever, or for what limit of time ? ' I think that there are two constructions of this document, each of which is good sense, and each of which seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last during the epidemic, and it was during the epidemic that the plaintiff contracted the disease. I think, more probably, it means that the smoke ball will be a protection while it is in use. That seems to me the way in which an ordinary person would understand an advertisement about medicine, and about a specific against influenza. It could not be supposed that after you have left off using it you are still to be protected for ever, as if there was to be a stamp set upon your forehead that you were never to catch influenza because you had once used the carbolic smoke ball. I think the immunity is to last during the use of the ball. That is the way in which I should naturally read it, and it seems to me that the subsequent language of the advertisement supports that construction. It says : ' During the last epidemic of influenza many thousand carbolic smoke balls were sold, and in no ascer-

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tained case was the disease contracted by those using ' (not ' who had used ') ' the carbolic smoke ball,' and it concludes with saying that one smoke ball will last a family several months (which imports that it is to be efficacious while it is being used), and that the ball can be refilled at a cost of 5*s*. I, therefore, have myself no hesitation in saying that I think, on the construction of this advertisement, the protection was to enure during the time that the carbolic smoke ball was being used. My brother, the Lord Justice who preceded me, thinks that the contract would be sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point; but it is not necessary for me to consider it further, because the disease here was contracted during the use of the carbolic smoke ball.

Was it intended that the 100*l*. should, if the conditions were fulfilled, be paid? The advertisement says that 1000*l*. is lodged at the bank for the purpose. Therefore, it cannot be said that the statement that 100*l*. would be paid was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon.

But it was said there was no check on the part of the persons who issued the advertisement, and that it would be an insensate thing to promise 100*l*. to a person who used the smoke ball unless you could check or superintend his manner of using it. The answer to that argument seems to me to be that if a person chooses to make extravagant promises of this kind he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them.

It was also said that the contract is made with all the world—that is, with everybody; and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to any one who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward

and perform the condition on the faith of the advertisement. It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate—offers to receive offers—offers to chaffer, as, I think, some learned judge in one of the cases has said. If this is an offer to be bound, then it is a contract the moment the person fulfils the condition. That seems to me to be sense, and it is also the ground on which all these advertisement cases have been decided during the century ; and it cannot be put better than in Willes, J.'s, judgment in *Spencer* v. *Harding* (Law Rep. 5 C. P. 561, 563). 'In the advertisement cases,' he says, 'there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract, of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, "and we undertake to sell to the highest bidder," the reward cases would have applied, and there would have been a good contract in respect of the persons.' As soon as the highest bidder presented himself, says Willes, J., the person who was to hold the vinculum juris on the other side of the contract was ascertained, and it became settled.

Then it was said that there was no notification of the acceptance of the contract. One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law—I say nothing about the laws of other countries—to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another

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person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

That seems to me to be the principle which lies at the bottom of the acceptance cases, of which two instances are the well-known judgment of Mellish, L.J., in *Harris's Case* (Law Rep. 7 Ch. 587), and the very instructive judgment of Lord Blackburn in *Brogden* v. *Metropolitan Ry. Co.* (2 App. Cas. 666, 691), in which he appears to me to take exactly the line I have indicated.

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that

common sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer.

A further argument for the defendants was that this was a nudum pactum—that there was no consideration for the promise—that taking the influenza was only a condition, and that the using the smoke ball was only a condition, and that there was no consideration at all; in fact, that there was no request, express or implied, to use the smoke ball. Now, I will not enter into an elaborate discussion upon the law as to requests in this kind of contracts. I will simply refer to *Victors* v. *Davies* (12 M. & W. 758) and Serjeant Manning's note to *Fisher* v. *Pyne* (1 M. & G. 265), which everybody ought to read who wishes to embark in this controversy. The short answer, to abstain from academical discussion, is, it seems to me, that there is here a request to use involved in the offer. Then as to the alleged want of consideration. The definition of 'consideration' given in Selwyn's Nisi Prius, 8th ed. p. 47, which is cited and adopted by Tindal, C.J., in the case of *Laythoarp* v. *Bryant* (3 Scott, 238, 250), is this: 'Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff, with the consent, either express or implied, of the defendant.' Can it be said here that if the person who reads this advertisement applies thrice daily, for such time as may seem to him tolerable, the carbolic smoke ball to his nostrils for a whole fortnight, he is doing nothing at all—that it is a mere act which is not to count towards consideration to support a promise (for the law does not require us to measure the adequacy of the consideration). Inconvenience sustained by one party at the request of the other is enough to create a consideration. I think, therefore, that it is consideration enough that the plaintiff took the trouble of using the smoke ball. But I think also that the defendants received a benefit from this user, for the use of the smoke ball was contemplated by the defendants as being indirectly a benefit to them, because the use of the smoke balls would promote their sale.

Then we were pressed with *Gerhard* v. *Bates* (2 E. & B. 476). In *Gerhard* v. *Bates* (2 E. & B. 476), which arose upon demurrer,

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the point upon which the action failed was that the plaintiff did not allege that the promise was made to the class of which alone the plaintiff was a member, and that therefore there was no privity between the plaintiffs and the defendant. Then Lord Campbell went on to give a second reason. If his first reason was not enough, and the plaintiff and the defendant there had come together as contracting parties and the only question was consideration, it seems to me Lord Campbell's reasoning would not have been sound. It is only to be supported by reading it as an additional reason for thinking that they had not come into the relation of contracting parties; but, if so, the language was superfluous. The truth is, that if in that case you had found a contract between the parties there would have been no difficulty about consideration; but you could not find such a contract. Here, in the same way, if you once make up your mind that there was a promise made to this lady who is the plaintiff, as one of the public—a promise made to her that if she used the smoke ball three times daily for a fortnight and got the influenza, she should have 100*l.*, it seems to me that her using the smoke ball was sufficient consideration. I cannot picture to myself the view of the law on which the contrary could be held when you have once found who are the contracting parties. If I say to a person, 'If you use such and such a medicine for a week I will give you 5*l.*,' and he uses it, there is ample consideration for the promise.

A. L. SMITH, L.J., delivered judgment to the same effect.

Appeal dismissed.

HARRIS v. NICKERSON.

'There is no doubt that documents may be so framed as, apart from representation and estoppel, to invite persons not parties to them to act upon the faith of some statements therein, and if such persons do in fact accept such invitation a complete contract will be established. A good illustration of this will be found in the case of *In re Agra and Masterman's Bank* (1867) [L. R. 2 Ch. 391]. . . . This is, however, in each case a question of construction of the document—not every declaration of intention, even although it assumes that persons will act on it, creates a contract.'—Per Farwell, J., in *Rainford* v. *James Keith & Blackman Company, Limited*, [1905] 1 Ch. at p. 302.

HARRIS *v.* NICKERSON (1873) L. R. 8 Q. B. 286

Case on appeal from the City of London Court.

The following were the particulars of claim: This action is brought to recover 2*l.* 16*s.* 6*d.* for two days loss of time by the plaintiff, at the special instance and request of the defendant, on the plaintiff attending at a public sale by auction, advertised by the defendant in the London newspapers to be held at the town of Bury St. Edmunds, on the 14th of August, 1872, for the disposal of certain goods and office fittings under bills of sale, and on the faith of which the plaintiff duly attended, and was ready to purchase in pursuance of such request and public notification aforesaid; but the defendant, in breach thereof, did suddenly and without notice withdraw the said goods and office fittings from the sale, and by which the plaintiff lost not only his two days time and railway fare, but the additional expense of two days board and lodging.

Two days loss of time	£1	1	0
Third-class railway fare	0	14	6
Two days board and lodging . . .	1	1	0
	£2	16	6

At the hearing it was proved that the sale was advertised as stated by the plaintiff, and catalogues circulated and distributed. A copy of the catalogue was put in evidence, by which it appeared that 'Under bills of sale' certain brewing materials, plant, and office furniture, would be sold by auction by Mr. Nickerson (the defendant), at Bury St. Edmunds, on Monday, 12th of August, 1872, and following days. The conditions were the usual conditions; the first being 'The highest bidder to be the buyer.'

It was also proved that the plaintiff had a commission to purchase at the sale the 'office furniture,' advertised to be sold.

The plaintiff went to Bury St. Edmunds and attended the sale, and purchased lots other than those described in the catalogue as 'office furniture.'

The articles described as 'office furniture' were not put up for sale, but were withdrawn.

On these facts the Judge gave judgment for the plaintiff, but at the request of the defendant, gave him leave to appeal.

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If the Court was of opinion that the plaintiff was not entitled to recover, the judgment was to be set aside and a nonsuit entered.

Macrae Moir, for the defendant, contended that it was clear that the mere advertising of a sale did not amount to a contract with anybody who attended the sale that any particular lot, or class of articles advertised, would be put up for sale. He referred to *Warlow* v. *Harrison* (1 E. & E. 295, 309; 28 L. J. (Q. B.) 18; 29 L. J. (Q. B.) 14); and *Payne* v. *Cave* (3 T. R. 148).

[QUAIN, J. referred to *Mainprice* v. *Westley* (6 B. & S. 420; 34 L. J. (Q. B.)]

Warton, for the plaintiff, contended that the advertisement of the sale by the defendant was a contract by him with the plaintiff, who attended the sale on the faith of it, that he would sell the property advertised according to the conditions; and the withdrawal of the property after the plaintiff had incurred expenses in consequence of the advertisement was a breach of such contract. A reasonable notice of the withdrawal, at all events, ought to have been given. He likened the case to that of an advertisement of a reward, which, though general in its inception, becomes a promise to the particular person who acts upon it before it has been withdrawn. (See *Williams* v. *Carwardine* 4 B. & Ad. 621.) He referred to *Spencer* v. *Harding* (Law Rep. 5 C. P. 561).

Macrae Moir was not heard in reply.

BLACKBURN, J.—I am of opinion that the judge was wrong. The facts were that the defendant advertised bonâ fide that certain things would be sold by auction on the days named, and on the third day a certain class of things, viz., office furniture, without any previous notice of their withdrawal, were not put up. The plaintiff says, inasmuch as I confided in the defendant's advertisement, and came down to the auction to buy the furniture (which it is found as a fact he was commissioned to buy) and have had no opportunity of buying, I am entitled to recover damages from the defendant, on the ground that the advertisement amounted to a contract by the defendant with anybody that should act upon it, that all the things advertised would be actually

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put up for sale, and that he would have an opportunity of bidding for them and buying. This is certainly a startling proposition, and would be excessively inconvenient if carried out. It amounts to saying that any one who advertises a sale by publishing an advertisement becomes responsible to everybody who attends the sale for his cab hire or travelling expenses. As to the cases cited: in the case of *Warlow* v. *Harrison* (1 E. & E. at pp. 314, 318; 29 L. J. (Q. B.) 14), the opinion of the majority of the judges in the Exchequer Chamber appears to have been that an action would lie for not knocking down the lot to the highest bonâ fide bidder when the sale was advertised as without reserve; in such a case it may be that there is a contract to sell to the highest bidder, and that if the owner bids there is a breach of the contract; there is very plausible ground at all events for saying, as the minority of the Court thought, that the auctioneer warrants that he has power to sell without reserve. In the present case, unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases after advertising a sale the auctioneer must give notice of any articles that are withdrawn, or be liable to an action, we cannot hold the defendant liable.

QUAIN and ARCHIBALD, JJ., delivered judgments to the same effect.

Judgment for the defendant.

BYRNE v. VAN TIENHOVEN.

'A little reflection will show that, in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present. The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and, if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other. It is obviously impossible, therefore, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment

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they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavour to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion until notice of such acceptance has been received and assented to by the company. For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed?'—Per Nelson, J. in *Tayloe* v. *Merchants' Fire Insurance Company* (1850) 9 Howard 390.[1]

BYRNE *v.* VAN TIENHOVEN (1880), L. R. 5 C. P. D. 344

LINDLEY, J.—This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1000 boxes of tinplates, pursuant to an alleged contract, which I will refer to presently. The action was tried at Cardiff before myself without a jury; and it was agreed at the trial that in the event of the plaintiffs being entitled to damages they should be 375*l.*

The defendants carried on business at Cardiff and the plaintiffs at New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The alleged contract consists of a letter written by the defendants to the plaintiffs on the 1st of October, 1879, and received by them on the 11th, and accepted by telegram and letter sent to the defendants on the 11th and 15th of October respectively. These letters and telegram were as follows:—[The learned judge read the letter of the 1st of October, 1879, from the defendants to the plaintiffs. It contained a reference to the price of tinplates branded 'Hensol,' and the 'offer of 1000 boxes of this brand 14×20 at 15*s.* 6*d.* per box

[1] The case of *Cooke* v. *Oxley* (1790) 3 T. R. 653 has at length been satisfactorily explained by the learned editor of Leake on Contracts in the preface to the 6th edition, 1911. When that case was decided the notion of a continuing offer appears to have been unknown; the opinion prevailed that offer and acceptance must be contemporaneous to constitute a valid contract, and they were not regarded as being contemporaneous unless both parties assented at the time of acceptance. The learned Editor supports this conjecture by a reference to *Kennedy* v. *Lee* (1817) 3 Mer. 441, per Eldon, L.C., at p. 454; and the argument of counsel in *Adams* v. *Lindsell* (1818) 1 B. & Ald. at p. 682 seems to add further confirmation. [Edd.]

f. o. b. here with 1 per cent. for our commission; terms, four months' bankers' acceptance on London or Liverpool against shipping documents, but subject to your cable on or before the 15th inst. here.' The answer was a telegram from the plaintiffs to the defendants sent on the 11th of October, 1879: 'Accept thousand Hensols.' On the 15th of October, 1879, the plaintiffs wrote to the defendants: 'We have to thank you for your valued letter under date 1st inst., which we had on Saturday P.M., and immediately cabled acceptance of the 1000 boxes "Hensol," 1c. 14/20 as offered. Against this transaction we have pleasure in handing you herewith the Canadian Bank of Commerce letter of credit No. 78, October 13th, on Messrs. A. R. McMaster Brothers, London, for 1000*l*. . . . . Will thank you to ship the 1000 "Hensols" without delay.'] These letters and telegram would, if they stood alone, plainly constitute a contract binding on both parties. The defendants in their pleadings say that there was no sufficient writing within the Statute of Frauds, and that they contracted only as agents; but these contentions were very properly abandoned as untenable, and do not require further notice. The defendants, however, raise two other defences to the action which remain to be considered. First, they say that the offer made by their letter of the 1st of October was revoked by them before it had been accepted by the plaintiffs by their telegram of the 11th or letter of the 15th. The facts as to these are as follows: On the 8th of October the defendants wrote and sent by post to the plaintiffs a letter withdrawing their offer of the 1st. The material part of this letter was as follows: 'Confirming our respects of the 1st inst. we hasten to inform you that there having been a regular panic in the tinplate market during the last few days, which has caused prices to run up about twenty-five per cent. we are reluctantly compelled to withdraw any offer we have made to our constituents, and must therefore also consider our offer to you for 1000 boxes "Hensols" at 17*s*. 6*d*. to be cancelled from this date.' This letter of the 8th of October reached the plaintiffs on the 20th of October. On the same day the plaintiffs telegraphed to the defendants demanding shipment, and sent them a letter insisting on completion of the contract. [The learned judge read the letter. In it the plaintiffs expressed astonishment at the contents of the letter of the 8th, recapitulated

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the transactions, and said ' practically and in fact a contract for 1000 boxes came into existence between you and ourselves. It requires the consent of both parties to a contract to cancel same. If instead of writing to us on the 8th you had cabled " offer withdrawn," you would have protected yourselves and us too. We disposed of the 1000 boxes on the 17th at a net profit of 1850 dollars. . . . We write our friend Philip S. Philips, Esq., of Aberkllery, requesting him to call on you and demand delivery as agreed.' In a postscript they added, ' You speak of offer of 1000 boxes Hensol at 17*s.* 6*d.* The only firm offer we received from you under date 1st of October was 1000 boxes at 15*s.* 6*d.*, and ten per cent. f. o. b. Cardiff ; we cable you to-night " demand shipment." '] This letter is followed by one from the defendants to the plaintiffs of the 25th of October refusing to complete. [The learned judge read it. The defendants acknowledged the receipt of the cable message of the 20th, inclosed the credit note sent in the letter of the 15th, and added, ' Our offer having been withdrawn by our letter of the 8th inst. we now return the above credit, for which we have no further need, but take this opportunity to observe that in case of any future business proposals between us, we must request you to conform to our rules and principles, which require bankers' credit in this country, whereas the firm of A. R. McMaster & Brothers are not classified as such.']

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not : *Routledge* v. *Grant* (4 Bing. 653). For the decision of the present case, however, it is necessary to consider two other questions, viz. : 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent ? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent ?

It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact

any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man ; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States : see *Tayloe* v. *Merchants Fire Insurance Co.* (9 How. Sup. Ct. Rep. 390), cited in Benjamin on Sales, pp. 56–58, and it is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock in his excellent work on Principles of Contract, ed. ii., p. 10, and by Mr. Leake in his Digest of the Law of Contracts, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question, viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st of October, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted : *Harris' Case* (Law Rep. 7 Ch. 587) ; *Dunlop* v. *Higgins* (1 H. L. 381), even although it never reaches its destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter ; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as communicated to the plaintiffs on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post ; and they

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had themselves resold the tin plates at a profit. In my opinion the withdrawal by the defendants on the 8th of October of their offer of the 1st was inoperative ; and a complete contract binding on both parties was entered into on the 11th of October, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles, and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.

The defendants' next defence is that, as the plaintiffs never sent a banker's acceptance on London or Liverpool as stipulated in the contract, they cannot maintain any action for its breach. The correspondence which preceded the contract satisfies me that the defendants attached importance to this particular mode of payment ; and although the plaintiffs sent letters of credit which were practically as good as a banker's acceptance, yet I cannot say that they did in fact send a banker's acceptance according to the contract.

By the terms of the contract bankers' acceptances on London or Liverpool were to be sent against,—i. e., were to be exchanged for—shipping documents ; and if the defendants had been ready and willing to perform the contract on their part on receiving proper bankers' acceptances, I should have been of opinion that the plaintiffs would not have sustained this action. But it is perfectly manifest from the correspondence that the defendants did not refuse to perform the contract on any such ground as this. It is true that the defendants in their letter of the 31st of October, say that, ' even if we had not withdrawn our offer we would all the same have returned your credit,' and the defendants' solicitors in their letter of the 26th of November, say that, ' if your clients (i. e. the plaintiffs), had fulfilled the terms of the

contract at the outset the goods were ready to be shipped;' but the defendants' own letters of the 8th, 13th, and 25th of October, shew conclusively that this was not the case and that the defendants stood on their notice of withdrawal and would not have performed the contract even if bankers' acceptances had been sent. Their letter of the 25th of October in which they return the plaintiffs' first letter of credit is explicit on this point. The defendants do not return the letter of credit because it is not a banker's acceptance, but because the offer was withdrawn; and the inference I draw from that letter is that if the offer had not been withdrawn the defendants would not have returned the letter of credit although in future transactions they might have been more particular. In face of this refusal, it was useless for the plaintiffs to send a banker's acceptance, and although when they found their first letter of credit returned they sent another which was declined, still the defendants never receded from their first position, or expressed any readiness to ship the goods on receiving a banker's acceptance; and it is plain to my mind that they were not prepared to do so. On the other hand, I am satisfied that if the defendants had taken this ground the plaintiffs would have sent bankers' acceptances in exchange for shipping documents, and I infer as a fact that the plaintiffs always were ready and willing to perform the contract on their part, although they did not in fact tender proper bankers' acceptances. It was contended that by pressing the defendants to perform their contract the plaintiffs treated it as still subsisting and could not treat the defendants as having broken it, and a passage in Mr. Benjamin's book on Sales, p. 454, was referred to in support of this contention. But, when the plaintiffs found that the defendants were inflexible, and would not perform the contract at all, they had, in my opinion, a right to treat it as at an end and to bring an action for its breach. It would indeed be strange if the plaintiffs by trying to persuade the defendants to perform their contract were to lose their right to sue for its non-performance when their patience was exhausted. The authorities referred to by Mr. Benjamin (viz., *Avery* v. *Bowden* (5 E. & B. 714) and others of that class), shew that as the plaintiffs did not when the defendants first refused to perform the contract, treat that refusal as a breach, the plaintiffs

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cannot now treat the contract as broken at the time of such refusal. But I have found no authority to shew that a continued refusal by the defendants to perform the contract cannot be treated by the plaintiffs as a breach of it by the defendants. On the contrary *Ripley* v. *McClure* (4 Ex. 345), and *Cort* v. *Ambergate, &c., Ry. Co.* (17 Q. B. 127), shew that the continued refusal by the defendants operated as a continued waiver of a tender of bankers' acceptances and enable the plaintiffs to sustain this action. In the present instance it is not necessary to determine exactly when the contract can be treated by the plaintiffs as broken by the defendants. It is sufficient to say that whilst the plaintiffs were always ready and willing to perform the contract on their part the defendants wrongfully and persistently refused to perform the contract on their part; and before action there was a breach by the defendants not waived by the plaintiffs. For the reasons above stated I give judgment for the plaintiffs for 375*l.* and costs.

Judgment for plaintiffs.

HENTHORN *v.* FRASER [1892], 2 Ch. 27

HENTHORN v. FRASER.

In 1891 the Plaintiff was desirous of purchasing from the *Huskisson Benefit Building Society* certain houses in *Flamank Street, Birkenhead.* In May he, at the office of the society in *Chapel Street, Liverpool,* signed a memorandum drawn up by the secretary, offering £600 for the property, which offer was declined by the directors; and on the 1st of July he made in the same way an offer of £700, which was also declined. On the 7th of July, he again called at the office, and the secretary verbally offered to sell to him for £750. This offer was reduced into writing, and was as follows:

'I hereby give you the refusal of the *Flamank Street* property at £750 for fourteen days.'

The secretary, after signing this, handed it to the Plaintiff, who took it away with him for consideration.

On the morning of the 8th another person called at the office, and offered £760 for the property, which was accepted, and a contract for purchase signed, subject to a condition for avoiding

it if the society found that they could not withdraw from the offer to the Plaintiff.

Between 12 and 1 o'clock on that day the secretary posted to the Plaintiff, who resided in *Birkenhead*, the following letter :—

'Please take notice that my letter to you of the 7th instant, giving you the option of purchasing the property, *Flamank Street, Birkenhead*, for £750, in fourteen days, is withdrawn, and the offer cancelled.'

This letter, it appeared, was delivered at the Plaintiff's address between 5 and 6 in the evening, but, as he was out, did not reach his hands till about 8 o'clock.

On the same 8th of July the Plaintiff's solicitor, by the Plaintiff's direction, wrote to the secretary as follows :

'I am instructed by Mr. *James Henthorn* to write you, and accept your offer to sell the property, 1 to 17, *Flamank Street, Birkenhead*, at the price of £750. Kindly have contract prepared and forwarded to me.'

This letter was addressed to the society's office, and was posted in *Birkenhead* at 3.50 P.M., was delivered at 8.30 P.M. after the closing of the office, and was received by the secretary on the following morning. The secretary replied, stating that the society's offer had been withdrawn.

The Plaintiff brought this action in the Court of the County Palatine for specific performance. The Vice-Chancellor dismissed the action, and the Plaintiff appealed.

Farwell, Q.C., and *T. R. Hughes*, for the appeal :—

We say that a binding contract was made when the Plaintiff's letter of acceptance was posted : *Dunlop* v. *Higgins* (1 H. L. C. 381) ; *Harris's Case* (Law Rep. 7 Ch. 587) ; *Adams* v. *Lindsell* (1 B. & Al. 681). We do not dispute that, though the option was given for fourteen days, it could be withdrawn within that time : *Dickinson* v. *Dodds* (2 Ch. D. 463) ; but if a binding contract is entered into, there cannot be a withdrawal. Where an acceptance is to be signified by doing some particular thing, as soon as that particular thing is done there is a contract : *Brogden* v. *Metropolitan Railway Company* (2 App. Cas. 666, 691). Where it must be in the contemplation of the parties that an answer will be sent by post, the posting an acceptance makes a contract. In

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the case of *Household Fire and Carriage Accident Insurance Company* v. *Grant* (4 Ex. D. 216) it was considered that, according to the usages of mankind, an acceptance would be sent by post; and it was held that posting an acceptance made a contract, though the acceptance was never received. Here, as the parties lived in different towns, it was to be expected that the Plaintiff would post his answer. In *Byrne* v. *Van Tienhoven* (5 C. P. D. 344) a withdrawal was held too late which was not received till after the offer had been accepted, though it was posted before the acceptance; and so in *Stevenson* v. *McLean* (5 Q. B. D. 346) it was held that a withdrawal of an offer was of no effect until it reached the other party.

Neville, Q.C., and *P. O. Lawrence*, for the Defendant:—

We submit that the Vice-Chancellor has drawn a correct inference—that there was no authority to accept by post; and if that be so, the acceptance will not date from the posting. *Dunlop* v. *Higgins* (1 H. L. C. 381) went on the ground that it was the understanding of both parties that an answer should be sent by post. In *Brogden* v. *Metropolitan Railway Company*, Lord *Blackburn* puts it on the ground 'that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted.' It would be very inconvenient to hold the post admissible in all cases. Here, *Liverpool* and *Birkenhead* are at such a short distance from each other, that it cannot be considered that the Plaintiff had an authority to reply by post. If the offer had been sent by post, that would, no doubt, be held to give an authority to reply by post; but the offer was delivered by hand to the Plaintiff, who was in the habit of calling at the Defendants' office, and lived only at a short distance, so that authority to reply by post cannot be inferred. The post is not prohibited; the acceptance may be sent in any way; but, unless sending it by post was authorized, it is inoperative till it is received. Suppose, immediately after posting the acceptance, the Plaintiff had gone to the office and retracted it, surely he would have been free.

[LORD HERSCHELL.—It is not clear that he would, after sending an acceptance in such a way that he could not prevent its reaching the other party. Possibly a case where the question is as to the

date from which an acceptance which has been received is operative may not stand on precisely the same footing as one where the question is whether the person making the offer is bound, though the acceptance has never been received at all. More evidence of authority to accept by post may be required in the latter case than in the former.]

Dickinson v. *Dodds* (2 Ch. D. 463) shews that a binding contract to sell to another person may be made while an offer is pending, and that it will be a withdrawal of the offer.

[Lord Herschell.—In that case the person to whom the offer was made knew of the sale before he sent his acceptance.]

Farwell, in reply.

Lord Herschell.—This is an action for the specific performance of a contract to sell to the Plaintiff certain house property situate in *Flamank Street, Birkenhead*. The action was tried before the Vice-Chancellor of the County Palatine of *Lancashire*, who gave judgment for the Defendants. On the 7th of July, 1891, the secretary of the building society whom the Defendants represent handed to the Plaintiff, in the office of the society at *Liverpool*, a letter in these terms: 'I hereby give you the refusal of the *Flamank Street* property at £750 for fourteen days.' It appears that the Plaintiff had been for some time in negotiation for the property, and had on two previous occasions made offers for the purchase of it, which were not accepted by the society. These offers were made by means of letters, written by the secretary in the office of the society, and signed by the Plaintiff there. The Plaintiff resided in *Birkenhead*, and he took away with him to that town the letter of the 7th of July containing the offer of the society. On the 8th of July a letter was posted in *Birkenhead* at 3.50 p.m., written by his solicitor, accepting on his behalf the offer to sell the property at £750. This letter was not received at the Defendants' office until 8.30 p.m., after office hours, the office being closed at 6 o'clock. On the same day a letter was addressed to the Plaintiff by the secretary of the building society in these terms: 'Please take notice that my letter to you of the 7th inst. giving you the option of purchasing the property, *Flamank Street, Birkenhead*, for £750, in fourteen days, is with-

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drawn and the offer cancelled.' This letter was posted in *Liverpool* between 12 and 1 P.M., and was received in *Birkenhead* at 5.30 P.M. It will thus be seen that it was received before the Plaintiff's letter of acceptance had reached *Liverpool*, but after it had been posted. One other fact only need be stated. On the 8th of July the secretary of the building society sold the same premises to Mr. *Miller* for the sum of £760, but the receipt for the deposit paid in respect of the purchase stated that it was subject to being able to withdraw the letter to Mr. *Henthorn* giving him fourteen days' option of purchase.

If the acceptance by the Plaintiff of the Defendants' offer is to be treated as complete at the time the letter containing it was posted, I can entertain no doubt that the society's attempted revocation of the offer was wholly ineffectual. I think that a person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn. This seems to me to be in accordance with the reasoning of the Court of King's Bench in the case of *Adams* v. *Lindsell* (1 B. & Al. 681), which was approved by the Lord Chancellor in *Dunlop* v. *Higgins* (1 H. L. C. 381, 399), and also with the opinion of Lord Justice *Mellish* in *Harris's Case* (Law Rep. 7 Ch. 587). The very point was decided in the case of *Byrne* v. *Van Tienhoven* (5 C. P. D. 344) by Lord Justice *Lindley*, and his decision was subsequently followed by Mr. Justice *Lush*. The grounds upon which it has been held that the acceptance of an offer is complete when it is posted have, I think, no application to the revocation or modification of an offer. These can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made. But it is contended on behalf of the Defendants that the acceptance was complete only when received by them and not on the letter being posted. It cannot, of course, be denied, after the decision in *Dunlop* v. *Higgins* (1 H. L. C. 381) in the House of Lords, that, where an offer has been made through the medium of the post, the contract is complete as soon as the acceptance of the offer is posted, but that decision is said to be inapplicable here, inasmuch as the letter containing the offer was not sent by post to *Birkenhead*, but handed to the Plaintiff in the Defendants' office at *Liverpool*. The question therefore arises in what circumstances the acceptance

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of an offer is to be regarded as complete as soon as it is posted. In the case of the *Household Fire and Carriage Accident Insurance Company* v. *Grant* (4 Ex. D. 216), Lord Justice *Baggallay* said (Ibid. 227): 'I think that the principle established in *Dunlop* v. *Higgins* is limited in its application to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized.' And in the same case Lord Justice *Thesiger* based his judgment (4 Ex. D. 218) on the defendant having made an application for shares under circumstances 'from which it must be implied that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post.' The facts of that case were that the defendant had, in *Swansea*, where he resided, handed a letter of application to an agent of the company, their place of business being situate in *London*. It was from these circumstances that the Lords Justices implied an authority to the company to accept the defendant's offer to take shares through the medium of the post. Applying the law thus laid down by the Court of Appeal, I think in the present case an authority to accept by post must be implied. Although the Plaintiff received the offer at the Defendants' office in *Liverpool*, he resided in another town, and it must have been in contemplation that he would take the offer, which by its terms was to remain open for some days, with him to his place of residence, and those who made the offer must have known that it would be according to the ordinary usages of mankind that if he accepted it he should communicate his acceptance by means of the post. I am not sure that I should myself have regarded the doctrine that an acceptance is complete as soon as the letter containing it is posted as resting upon an implied authority by the person making the offer to the person receiving it to accept by those means. It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance by post. He needs no authority to transmit the acceptance through any particular channel; he may select what means he pleases, the Post Office no less than any other. The only effect of the supposed authority is to make the acceptance

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complete so soon as it is posted, and authority will obviously be implied only when the tribunal considers that it is a case in which this result ought to be reached. I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted. It matters not in which way the proposition be stated, the present case is in either view within it. The learned Vice-Chancellor appears to have based his decision to some extent on the fact that before the acceptance was posted the Defendants had sold the property to another person. The case of *Dickinson* v. *Dodds* (2 Ch. D. 463) was relied upon in support of that defence. In that case, however, the plaintiff knew of the subsequent sale before he accepted the offer, which, in my judgment, distinguishes it entirely from the present case. For the reasons I have given, I think the judgment must be reversed and the usual decree for specific performance made. The Respondents must pay the costs of the appeal and of the action.

LINDLEY, L.J.—I quite concur. I am not prepared to accede to the argument that because the offer was not made by post there was no authority to send an acceptance by post, and the Vice-Chancellor, in my opinion, fell into a mistake by acceding to it.

KAY, L.J.—On the 7th of July, 1891, the Defendants gave to the Plaintiff, who was then in their office in *Liverpool*, an offer in writing to sell him certain real property at *Birkenhead*, where the Plaintiff resided. The Plaintiff had been on several previous occasions at their office on this or like business. He was not able to write beyond signing his name. On the 8th of July his solicitor wrote by his direction accepting the offer. This letter was posted at 3.50 P.M., and arrived at 8.30 the same evening. This was after office hours, and it was not opened till 10 o'clock next morning. In the meantime the Defendants wrote withdrawing their offer on the same 8th of July, and posted their better between 12 and 1 P.M. This was received at 5.30 the same evening.

On the same 8th of July the Defendants entered into a contract to sell the same property to another person with an express condition if they were able to withdraw their offer to the Plaintiff.

The question is, was the withdrawal in time or too late.

Dunlop v. *Higgins* (1 H. L. C. 381) has decided that, where a letter sent by post was a proper mode of acceptance, the contract was complete from the time that the letter was posted. In that case the letter was actually received, though, by fault of the Post Office, there was some delay in its transmission. Upon receipt of it, the offer was withdrawn. The question was the same as in the present case, except that the withdrawal was after the actual receipt of the acceptance which was treated as being too late. It was held that, by posting the letter in due time, the party by the usage of trade had done all that he was bound to do. He could not be responsible for the delay of the Post Office in delivering the letter, and therefore there was from the time of the posting a valid acceptance. It might have still been doubtful whether posting a letter of acceptance in time would amount to an acceptance if the letter was never received. The ordinary rule is, that to constitute a contract there must be an offer, an acceptance, and a communication of that acceptance to the person making the offer: per Lord *Blackburn* in *Brogden* v. *Metropolitan Railway Company* (2 App. Cas. 692); and see *per* Lord *Bramwell* (4 Ex. D. 233). It may be that where the communication is in fact received, the contract may date back to the time of posting the acceptance, but there is considerable reason for holding that if never received the posting might be treated as a nullity. The point was so decided in *British and American Telegraph Company* v. *Colson* (Law Rep. 6 Ex. 108); and see the judgment of Lord *Bramwell* in *Household Fire and Carriage Accident Insurance Company* v. *Grant*. However, in the last-mentioned case, which is a decision binding upon this Court, the Court of Appeal, *Bramwell*, L.J., dissenting, held, that the posting of a letter of allotment in answer to an application for shares constituted a binding contract to take the shares though the letter of allotment was not received. In his judgment, *Thesiger*, L.J., refers to the cases in which the decision in *Dunlop* v. *Higgins* (1 H. L. C. 381) has been explained by saying that the Post Office was treated as the common agent of both contracting parties. That reason

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is not satisfactory. The Post Office are only carriers between them. They are agents to convey the communication, not to receive it. The communication is not made to the Post Office, but by their agency as carriers. The difference is between saying 'Tell my agent *A.*, if you accept,' and 'Send your answer to me by *A.*' In the former case *A.* is to be the intelligent recipient of the acceptance, in the latter he is only to convey the communication to the person making the offer which he may do by a letter, knowing nothing of its contents. The Post Office are only agents in the latter sense. All that *Dunlop* v. *Higgins* (1 H. L. C. 381) decided was, that the acceptor of the offer having properly posted his acceptance, was not responsible for the delay of the Post Office in delivering it; so that after receipt the said party could not rescind on the ground of that delay. I cannot help thinking that the decision has been treated as going much further than the House of Lords intended. *Baggallay*, L.J., in his judgment in *Household Fire and Carriage Accident Insurance Company* v. *Grant* (4 Ex. D. 227), treats it as applicable 'to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized.' If for authorized the word 'contemplated' is substituted, I should be disposed to agree with this dictum. But I would rather express it thus: 'Posting an acceptance of an offer may be sufficient where it can fairly be inferred from the circumstances of the case that the acceptance might be sent by post.'

Is that a proper inference in the present case? I think it is. One party resided in *Liverpool*, the other in *Birkenhead*. The acceptance would be expected to be in writing, the subject of purchase being real estate. These and the other circumstances to which I have alluded, in my opinion, warrant the inference that both parties contemplated that a letter sent by post was a mode by which the acceptance might be communicated. I think, therefore, that we are bound by authority to hold that the contract was complete at 3.50 P.M. on the 8th of July, when the letter of acceptance was posted, and before the letter of withdrawal was received.

Then what was the effect of the withdrawal by the letter posted

between 12 and 1 the same day, and received in the evening? Did that take effect from the time of posting? It has never been held that this doctrine applies to a letter withdrawing the offer. Take the cases alluded to by Lord *Bramwell* in the *Household Fire and Carriage Accident Insurance Company* v. *Grant* (4 Ex. D. 234). A notice by a tenant to quit can have no operation till it comes to the actual knowledge of the person to whom it is addressed. An offer to sell is nothing until it is actually received. No doubt there is the seeming anomaly pointed out by Lord *Bramwell* that the same letter might contain an acceptance, and also such a notice or offer as to other property, and that when posted it would be effectual as to the acceptance, and not as to the notice or offer. But the anomaly, if it be one, arises from the different nature of the two communications. As to the acceptance, if it was contemplated that it might be sent by post, the acceptor, in Lord *Cottenham's* language, has done all that he was bound to do by posting the letter, but this cannot be said as to the notice of withdrawal. That was not a contemplated proceeding. The person withdrawing was bound to bring his change of purpose to the knowledge of the said party, and as this was not done in this case till after the letter of acceptance was posted, I am of opinion that it was too late.

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The point has been so decided in two cases: *Byrne* v. *Van Tienhoven* (5 C. P. D. 344), and *Stevenson* v. *McLean* (5 Q. B. D. 346), and I agree with those decisions.

It has been thought advisable to append the pertinent passage from the following case, which appears to be the only reported decision, except the unsatisfactory case of *Dickinson* v. *Dodds* (1876) 2 Ch. D. 463, as to the effect of an unauthorized communication of the revocation of an offer:—

CARTWRIGHT *v.* HOOGSTOEL (1911) 105 L. T. 628

CARTWRIGHT v. HOOGSTOEL. Eve, J.

EVE, J.—In this action the plaintiff claims specific performance of an agreement to let from Christmas 1910 for a term of three years, at a rental of 85*l.* p.a., certain rooms situate at No. 132 Seymour Place, Bryanston Square, lately in the occupation of one Nonweiler, a solicitor.

The defences to the action are three in number. The defendant alleges, first, that the documents referred to in par. 2 of the statement of claim do not constitute an agreement. Secondly, that, if on the face of them they constitute an agreement, they do not express the whole agreement between the parties in that the offer contained in the first of them was to the knowledge

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of the plaintiff a conditional offer, and that, the condition precedent not having been complied with, the acceptance of the offer did not result in any contract; and, thirdly, that, if there really was an unconditional offer capable of being converted into a contract, the offer was withdrawn before it was accepted.

The offer and acceptance are contained in two letters dated respectively 4th and 10th May 1910, which read as follows:

132 Seymour Place,
4th May 1910.

Stamp, 6*d*.—I hereby give to Mr. Richard Cartwright an option to take the premises now in the occupation of the executors of the late Mr. A. H. D. Nonweiler of 132 Seymour Place, Bryanston Square, W., and used for the practice of a solicitor. The option to be to take these premises (consisting of two rooms) for a term of three years from Christmas 1910, at a rental of 85*l*. a year, on the same terms and conditions as the late Mr. Nonweiler held the said premises. This option to remain open for the period of seven days.—(Signed) Victor Hoogstoel.

132 Seymour Place, Bryanston Square, W.,
10 9th (sic) May 1910.

Dear Sir,—132 Seymour Place.—I hereby exercise the option dated the 4th inst. and signed by you to take the premises at 132 Seymour Place, consisting of two rooms now or lately in the occupation of the executors of the late Mr. A. H. D. Nonweiler, for the term of three years commencing from Christmas 1910, at a rental of 85*l*. a year, on the same terms and conditions as the late Mr. Nonweiler held the said premises of you.—Yours faithfully, (signed) R. Cartwright.—Victor Hoogstoel, Esq.

[His Lordship, having held that the defence, so far as it was based on the allegation that the letters did not constitute a contract, failed altogether, and that on the evidence the defence that the contract was a conditional contract also failed, continued as follows:—]

That brings me to the consideration of the third line of defence, which is comprised in a small compass and consists in the allegation contained in par. 4 of the defence that prior to the 10th May the plaintiff was informed that the offer and option of the 4th May had been withdrawn. Now on reading that paragraph of the defence, I frankly admit that I anticipated, and my view was I think shared by the plaintiff's advisers, that the plea was to be substantiated by proof of some notice of withdrawal communicated by the defendant to the plaintiff before the plaintiff wrote his letter of the 10th May, but at the bar the case made was this, that before acceptance notice was brought home to the plaintiff of conduct on the part of the defendant quite inconsistent with a continuing offer, and consistent only with an absolute withdrawal of the offer, and that after having received such notice it was no longer open to the plaintiff to treat the offer as still capable of acceptance. In order to appreciate that defence I must state a few of the material facts. . . .

The main object of the plaintiff in securing the premises the subject of the agreement was to put himself in a strong position in his negotiations for the acquisition of the practice of a well-known solicitor who had occupied the premises and carried on a successful business there for eighteen years. He died on Saturday, the 30th April, and one of his executors advertised the practice for sale in the *Daily Telegraph* on Monday, the 2nd May. The solicitor had been ill for some time, and during that time and on other previous occasions the plaintiff had assisted in the conduct of the business, and the executor in question, Mr. Fairbridge, was anxious, as the plaintiff well knew, that the plaintiff should have the first chance of buying the business. The advertisement was seen by Mr. Romain on the same morning on which it appeared, and he at once put himself into communication with Fairbridge, who, therefore, before the day was out was in the satisfactory position of having two likely applicants for the business. In the meantime both applicants had put themselves into communication with the defendant, from whom they learned that the tenancy of the deceased would terminate on the 25th Dec. 1910. Both gentlemen fully appreciated that from a purchaser's point of view the value of the business and goodwill was largely dependent on his being able to retain the premises not only till Christmas, but afterwards, and both appreciated that, hand in hand with the negotiations for the acquisition of the practice, negotiations must proceed with the defendant for securing an interest in the premises on the expiry of the term vested in the executors. On these lines both the plaintiff and Mr. Romain negotiated with the executors and the defendant and various interviews took place between the parties. According to the defendant, by the evening of Tuesday, the 3rd May, the position of affairs was this: Mr. Romain was 'nibbling' at it, but as yet had not made a definite offer, while Mr. Fairbridge and the defendant were both anxious that the plaintiff should become the purchaser of the practice and the tenant of the premises, and, according to the defendant's evidence, he had down to that time proceeded entirely upon the assumption that the premises and the practice would go to the same person. He says, however, that on the evening of the 3rd May the plaintiff came to see him and told him that Fairbridge was asking an exorbitant sum for the practice, and that thereupon he considered himself absolved from any duty of working with Fairbridge and felt justified in looking after himself and his interests only, and in negotiating with the plaintiff quite independently of Fairbridge and his negotiations. The plaintiff explained that he had to consult his father and obtain his assistance, and he desired the defendant to give him something in writing to show to his father, and the defendant on the next day, fully alive, as I have already held, to the fact that he was offering to let the premises to the plaintiff without reference to the question whether the plaintiff would purchase the practice, but with the conviction no doubt that the effect of giving the plaintiff the option of the premises would be to bring down Mr. Fairbridge's demands to a figure which would be acceptable to the plaintiff, signed the offer—for such only it is in law—on the evening of the 4th May.

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The plaintiff having got into this advantageous position, which no doubt he fully appreciated, went with his father and saw Fairbridge, but when they told Fairbridge what the defendant had done, and named a very small figure as the value of the practice apart from the premises, Fairbridge declined to discuss the sale of the practice with them any further, and sent them to Mr. Cook, the solicitor acting for the executors. After they had left, Fairbridge at once went to see the defendant, who told him that what he had given to the plaintiff was a conditional offer only, and that he need not trouble himself about it. Fairbridge accepted this statement as true. The visit to Mr. Cook resulted in nothing, and the plaintiff and his father then returned and had another interview with Fairbridge, but, although they increased their former offer, the figure they named was so far short of Fairbridge's estimate of the value of the business that he not only could not accept it, but was forced to the conclusion that the plaintiff did not seriously contemplate purchasing at all, and that Mr. Romain was the more likely customer. Accordingly after this interview he put himself into communication with Mr. Romain, with the result that on the next day, the 5th May, there was an interview at Mr. Cook's office, which was attended by Mr. Romain and his father, Fairbridge, and the defendant. At that interview matters were discussed, and before it concluded, an agreement was entered into whereby the executors agreed to sell and Romain agreed to purchase the practice, and the defendant agreed to grant and Romain to accept a lease of the rooms for the term of twenty-one years from Christmas 1910, at a rent of 75*l.* per annum, and subject to the payment of a premium of 150*l.*

A somewhat extraordinary incident happened just as the interview was coming to an end. Mr. Cook was rung up on the telephone, and he was asked by some one, who I conclude was the plaintiff, whether the matter (i. e. the offer of the practice) was still open, and, if so, whether Mr. Fairbridge was prepared to negotiate further with the plaintiff. That inquiry was directed solely to the negotiations for the sale and purchase of the practice, and had no reference to the defendant. Mr. Cook was not acting, or, if he was acting, the plaintiff had no notice of the fact, in any way as to the agreement for the lease, but had only been instructed by the executors to negotiate about the practice. Moreover, as I have already held, the plaintiff at the moment when he made the inquiry was in possession of a firm unconditional offer of the premises, which he could convert into a contract at any time before the 11th May.

When the inquiries were made Cook turned to Fairbridge, and asked what answer he was to make, and the latter, having nothing to conceal, told him to say that the matter was settled. I take from the evidence of Romain what it was that Cook told the plaintiff. He told him that Fairbridge, Romain and his father, and the defendant were all present, and added 'we have settled with Romain'. That was the communication made to the plaintiff on the morning of the 5th May, and counsel for the defendant argue that when the plaintiff learned who were present at that interview and that Romain had purchased the practice it is impossible that he could really have

thought that the business had been sold without any agreement being come to as to a tenancy of the premises from the following Christmas, and that he must have appreciated that the sale to Romain had resulted in the defendant adopting a course of conduct which was in fact a withdrawal of the offer previously made to the plaintiff. I should not myself, if this communication had stood alone, have been prepared to hold that a withdrawal of the offer was necessarily to be inferred therefrom. When one is dealing with imperfectly heard observations made at the end of a business interview and not relating directly to the business in hand, nor concerning very much those who are present, it must not be forgotten that it is more than likely that the message may have reached the plaintiff in a somewhat different form than that now recalled in the witness-box. For example, in this very case Fairbridge, a witness of integrity and truth, has brought himself to believe that Cook's message to the plaintiff concluded with the statement that the lease had been 'taken up' or 'granted'. I am quite satisfied that nothing of this sort was said, and I accept Romain's version of what was in fact said as substantially accurate. But the matter does not rest on this communication alone. On the same 5th May Romain was put into possession of the offices, and the late owner was laid to his rest. Among those who attended his funeral was his former clerk, Richardson, who had naturally been brought into connexion with the plaintiff, and had come to look upon him as the only proper purchaser of the business, the more so as the plaintiff in that event had agreed to give him employment therein. When Richardson got back from the funeral he found, not the plaintiff, but Romain in the office, and as he had had no prior communication with Romain, he naturally felt somewhat nervous as to his own immediate future. Accordingly he called on the plaintiff, and, not knowing anything about Romain's purchase, merely informed the plaintiff that Romain was in the office. When this information was given to the plaintiff, he at once replied, 'Hoogstoel has played me a dirty trick and I shan't forget him.' What does such an observation as that imply? It leads irresistibly to this conclusion, that the plaintiff at that moment appreciated that the defendant had, in letting Romain become occupant of the offices, done something to the prejudice of the plaintiff. It is not as if the plaintiff had complained of Fairbridge having sold the practice, nor could the observation have had any reference to the fact that Romain was in actual occupation, because this was a matter over which the defendant had no control, the tenancy of the executors not being determinable until Christmas. The observation shows clearly that the plaintiff had in mind some trick or shabby treatment played upon him by the defendant, and the only conduct by the defendant which could prejudice the plaintiff was a dealing or bargain with Romain inconsistent with the offer of the 4th May, and I think, when one arrives at the conclusion that the plaintiff appreciated this fact, it is impossible to believe that the plaintiff really considered that offer as a continuing offer after the 5th May 1910. On the 10th he purported to accept it, but in my opinion it was too late. The defendant had by conduct brought to the knowledge of the plaintiff effectually withdrawn the

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offer before acceptance, and he therefore succeeds on that part of the defence which alleges that there was no continuing offer after the 5th May.

There was one other matter which has been raised and upon which I will add a few words. If I had found for the plaintiff on the issue just disposed of, is the case one for an order for specific performance? Mr. Jessel has pointed out that before Romain took up the lease he had full notice of the plaintiff's rights. That, I think, is established, but it is also established that before he entered into the agreement of the 5th May he had no notice of such rights. In these circumstances it is argued that, the equities of the parties being equal, the plaintiff's acceptance of the 10th May relates back to the date of the offer, and that the plaintiff's contract must be treated as prior in date to Romain's contract. I do not think that argument is sound. The plaintiff had no contract with the defendant until his acceptance of the offer was communicated to the defendant, and in the meantime the contract had been made with Romain. As between the plaintiff and Romain I should therefore hold that the equity of the latter was prior in date, and in these circumstances I should not have made any decree for specific performance.

I have now only to deal with the costs of the action. I think a large proportion of the costs have been occasioned by what I have held to be an unfounded defence put forward by the defendant, and accordingly I dismiss the action without costs.

PARKER v. SOUTH EASTERN RAILWAY COMPANY. GABELL v. THE SAME.

'The first point that I have to determine is whether the conditions on the ticket did or did not form part of the contract. That question is one of fact. I was indeed invited by the defendants' counsel to hold as matter of law, upon the authority of the well-known case of *Watkins* v. *Rymill* (1883) 10 Q. B. D. 178, that the mere delivery and acceptance of the ticket with the conditions upon it was sufficient to make the conditions part of the contract. But that I am not at liberty to do. The case of *Richardson* v. *Rowntree* [1894] A. C. 217 in the House of Lords clearly decided that the acceptance of the ticket does not of itself necessarily make all the conditions upon that ticket a part of the contract. It decided that the proper questions to be left to the jury were those which were formulated by the majority of the Court of Appeal in *Parker* v. *South Eastern Railway Co.*, namely, (1) whether the plaintiff knew that there was writing or printing on the ticket; (2) whether the plaintiff knew that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage; and (3) whether the defendants did what was reasonably sufficient to give the plaintiff notice of the conditions.'—Per Pickford, J., in *Marriott* v. *Yeoward Brothers* [1909] 2 K. B. at p. 992.

'This is a class of case in which of citing of authorities there is no end, and yet it is, I think, quite possible to say, "Hear the conclusion of the whole matter." The case of *Parker* v. *South Eastern Railway Co.*, which has been approved in every case decided since its date, really stereotyped

the question which the tribunal, be it jury or judge, must put to itself when such a question arises.'—Per Lord Dunedin in *Hood* v. *Anchor Line* (*Henderson Brothers*) [1918] A. C. at p. 846.

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PARKER *v.* SOUTH EASTERN RAILWAY COMPANY
GABELL *v.* SOUTH EASTERN RAILWAY COMPANY (1877)
L. R. 2 C. P. D. 416 (C. A.)

Actions against the South Eastern Railway Company for the value of bags and their contents lost to the plaintiffs respectively by the negligence of the company's servants.

The plaintiff in each case had deposited a bag in a cloak-room at the defendants' railway station, had paid the clerk 2*d.*, and had received a paper ticket, on one side of which were written a number and a date, and were printed notices as to when the office would be opened and closed, and the words 'See back.' On the other side were printed several clauses relating to articles left by passengers, the last of which was, 'The company will not be responsible for any package exceeding the value of 10*l.*' In each case the plaintiff on the same day presented his ticket and demanded his bag, and in each case the bag could not be found, and had not been since found. Parker claimed 24*l.* 10*s.* as the value of his bag, and Gabell claimed 50*l.* 16*s.* The company in each case pleaded that they had accepted the goods on the condition that they would not be responsible for the value if it exceeded 10*l.*; and on the trial they relied on the words printed on the back of the ticket, and also on the fact that a notice to the same effect was printed and hung up in the cloak-room. Each plaintiff gave evidence and denied that he had seen the notice, or read what was printed on the ticket. Each plaintiff admitted that he had often received such tickets, and knew there was printed matter on them, but said that he did not know what it was. Parker said that he imagined the ticket to be a receipt for the money paid by him; and Gabell said he supposed it was evidence of the company having received the bag, and that he knew that the number on it corresponded with a number on his goods.

Parker's case was tried at Westminster on the 27th of February, 1876, before Pollock, B.; and Gabell's case was tried at Westminster on the 15th of November, 1876, before Grove, J. The

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questions left in each case by the judge to the jury were: 1. Did the plaintiff read or was he aware of the special condition upon which the articles were deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or make himself aware of the condition?

The jury in each case answered both questions in the negative, and the judge thereupon directed judgment to be entered for the plaintiff for the amount claimed, reserving leave to the defendants to move to enter judgment for them.

In Parker's case the defendants moved to enter judgment, and also obtained from the Common Pleas Division an order nisi for a new trial, on the ground of misdirection. The order was discharged, and the motion was refused by the Common Pleas Division.

The defendants appealed.

In Gabell's case the defendants applied to the Common Pleas Division for an order nisi for a new trial on the ground of misdirection, but the Court refused to grant the order. The defendants then moved for judgment and also obtained from the Court of Appeal an order nisi for a new trial, on the ground of misdirection.

The cases were heard together.

MELLISH, L.J.—In this case we have to consider whether a person who deposits in the cloak-room of a railway company, articles which are lost through the carelessness of the company's servants, is prevented from recovering, by a condition on the back of the ticket, that the company would not be liable for the loss of goods exceeding the value of 10*l*. It was argued on behalf of the railway company that the company's servants were only authorized to receive goods on behalf of the company upon the terms contained in the ticket; and a passage from Mr. Justice Blackburn's judgment in *Harris* v. *Great Western Ry. Co.* (1 Q. B. D. at p. 533), was relied on in support of their contention: 'I doubt much—inasmuch as the railway company did not authorize their servants to receive goods for deposit on any other terms, and as they had done nothing to lead the plaintiff to believe that they had given such authority to their servants so as to preclude them from asserting, as against her, that the authority

was so limited—whether the true rule of law is not that the plaintiff must assent to the contract intended by the defendants to be authorized, or treat the case as one in which there was no contract at all, and consequently no liability for safe custody.' I am of opinion that this objection cannot prevail. It is clear that the company's servants did not exceed the authority given them by the company. They did the exact thing they were authorized to do. They were authorized to receive articles on deposit as bailees on behalf of the company, charging 2*d.* for each article, and delivering a ticket properly filled up to the person leaving the article. This is exactly what they did in the present cases, and whatever may be the legal effect of what was done, the company must, in my opinion, be bound by it. The directors may have thought, and no doubt did think, that the delivering the ticket to the person depositing the article would be sufficient to make him bound by the conditions contained in the ticket, and if they were mistaken in that, the company must bear the consequence.

The question then is, whether the plaintiff was bound by the conditions contained in the ticket. In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents. The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it. In that case, also, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement and did not know its contents. Now if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are. I hold therefore that

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the case of *Harris* v. *Great Western Ry. Co.* (1 Q. B. D. 515), was rightly decided, because in that case the plaintiff admitted, on cross-examination, that he believed there were some conditions on the ticket. On the other hand, the case of *Henderson* v. *Stevenson* (Law Rep. 2 H. L., Sc. 470), is a conclusive authority that if the person receiving the ticket does not know that there is any writing upon the back of the ticket, he is not bound by a condition printed on the back. The facts in the cases before us differ from those in both *Henderson* v. *Stevenson* (Law Rep. 2 H. L., Sc. 470) and *Harris* v. *Great Western Ry. Co.* (1 Q. B. D. 515), because in both the cases which have been argued before us, though the plaintiffs admitted that they knew there was writing on the back of the ticket, they swore not only that they did not read it, but that they did not know or believe that the writing contained conditions, and we are to consider whether, under those circumstances, we can lay down as a matter of law either that the plaintiff is bound or that he is not bound by the conditions contained in the ticket, or whether his being bound depends on some question of fact to be determined by the jury, and if so, whether, in the present case, the right question was left to the jury.

Now, I am of opinion that we cannot lay down, as a matter of law, either that the plaintiff was bound or that he was not bound by the conditions printed on the ticket, from the mere fact that he knew there was writing on the ticket, but did not know that the writing contained conditions. I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction, where it would be quite reasonable that the party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread. For instance, if a person driving through a turnpike-gate received a ticket upon paying the toll, he might reasonably assume that the object of the ticket was that by producing it he might be free from paying toll at some other turnpike-gate, and might put it in his pocket unread. On the other hand, if a person who ships goods to be carried on a voyage by sea receives a bill of lading signed by the master, he would plainly be bound by it, although afterwards in an action against the shipowner for the loss of the goods, he might swear that he

had never read the bill of lading, and that he did not know that it contained the terms of the contract of carriage, and that the shipowner was protected by the exceptions contained in it. Now the reason why the person receiving the bill of lading would be bound seems to me to be that in the great majority of cases persons shipping goods do know that the bill of lading contains the terms of the contract of carriage ; and the shipowner, or the master delivering the bill of lading, is entitled to assume that the person shipping goods has that knowledge. It is, however, quite possible to suppose that a person who is neither a man of business nor a lawyer might on some particular occasion ship goods without the least knowledge of what a bill of lading was, but in my opinion such a person must bear the consequences of his own exceptional ignorance, it being plainly impossible that business could be carried on if every person who delivers a bill of lading had to stop to explain what a bill of lading was.

Now the question we have to consider is whether the railway company were entitled to assume that a person depositing luggage, and receiving a ticket in such a way that he could see that some writing was printed on it, would understand that the writing contained the conditions of contract, and this seems to me to depend upon whether people in general would in fact, and naturally, draw that inference. The railway company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits luggage with them : I think they are entitled to assume that he can read, and that he understands the English language, and that he pays such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloak-room. The railway company must, however, take mankind as they find them, and if what they do is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness. But if what the railway company do is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit without obtaining the consent of the persons depositing them to the conditions limiting their liability. I am of opinion, therefore, that the proper direction

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to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions.

I have lastly to consider whether the direction of the learned judge was correct, namely, 'Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or to make himself aware of the condition?' I think that this direction was not strictly accurate, and was calculated to mislead the jury. The plaintiff was certainly under no obligation to read the ticket, but was entitled to leave it unread if he pleased, and the question does not appear to me to direct the attention of the jury to the real question, namely, whether the railway company did what was reasonably sufficient to give the plaintiff notice of the condition.

On the whole, I am of opinion that there ought to be a new trial.

BAGGALLAY, L.J., concurred, and BRAMWELL, L.J., delivered a dissenting judgment.

Orders absolute for new trials.

WINN v. BULL.

'The first question which presents itself in construing a correspondence wherein there are repeated references to the preparation of a contract is this: did the parties contemplate and intend by their correspondence to come to a concluded agreement and then reduce the agreement so come to into writing, or did they contemplate and intend thereby to negotiate the terms and conditions of the bargain, but not to enter into any concluded agreement except in the shape of a formal written contract?'—Per Eve, J. in *Coope* v. *Ridout* [1920] 2 Ch. at p. 416.

WINN *v.* BULL (1877) 7 Ch. D. 29

On the 16th of March, 1877, the Plaintiff and Defendant entered into and signed the following agreement for a lease of a freehold house belonging to the Plaintiff:—

'An agreement entered into between *William Winn* (the

Plaintiff) of the one part, and *Edward Bull* (the Defendant) of the other part: whereby the said *William Winn* agrees to let and the said *Edward Bull* agrees to take on lease for the term of seven years from the 9th day of May, 1877, the dwelling-house and premises known as "*Westwood*," situate in the *Avenue, Southampton*, as the same were lately in the occupation of Mrs. *Sullivan*, at the yearly rent of £180, the first year's rent to be allowed to the said *Edward Bull* and to be laid out by him in substantial repairs to the property. This agreement is made subject to the preparation and approval of a formal contract.'

No formal or other contract was ever entered into between the parties.

The Plaintiff's solicitor subsequently sent the Defendant's solicitor a draft of the proposed lease containing covenants on the part of the Defendant to keep the premises in repair.

The Defendant objecting to take a lease in this form, a correspondence passed between the parties, which resulted in the Plaintiff insisting that the lease should remain substantially in its original form, whereas the Defendant contended that its terms were contrary to the intention of the agreement, and he ultimately refused to take a lease at all. The Plaintiff thereupon brought this action claiming specific performance of the agreement.

In his statement of defence the Defendant relied upon the *Statute of Frauds*, alleging that the agreement was conditional only, and that no final agreement for a lease was ever reduced into writing or signed by him or his agent within the meaning of the statute.

The Plaintiff then joined issue, and the action now came on for trial.

Chitty, Q.C., and *Jolliffe*, for the Plaintiff, contended that the agreement was sufficiently clear in its terms; that it was equivalent to an agreement for a lease containing 'usual covenants,' which would include a covenant to repair; and that the final clause meant nothing more than that the parties should be bound in a more formal manner. They referred to *Rossiter* v. *Miller* (5 Ch. D. 648), *Crossley* v. *Maycock* (Law Rep. 18 Eq. 180), and *Chinnock* v. *Marchioness of Ely* (4 D. J. & S. 638).

Roxburgh, Q.C., and *Maidlow*, for the Defendant; were not called upon.

WINN v. BULL. Jessel, M.R.

JESSEL, M.R.—I am of opinion there is no contract. I take it the principle is clear. If in the case of a proposed sale or lease of an estate two persons agree to all the terms and say, 'We will have the terms put into form,' then all the terms being put into writing and agreed to, there is a contract.

If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled.

Now with regard to the construction of letters which are relied upon as constituting a contract, I have always thought that the authorities are too favourable to specific performance. When a man agrees to buy an estate, there are a great many more stipulations wanted than a mere agreement to buy the estate and the amount of purchase-money that is to be paid. What is called an open contract was formerly a most perilous thing, and even now, notwithstanding the provisions of a recent Act of Parliament—the *Vendor and Purchaser Act*, 1874—no prudent man who has an estate to sell would sign a contract of that kind, but would stipulate that certain conditions should be inserted for his protection. When, therefore, you see a stipulation as to a formal agreement put into a contract, you may say it was not put in for nothing, but to protect the vendor against that very thing. Indeed, notwithstanding protective conditions, the vendor has not unfrequently to allow a deduction from the purchase-money to induce the purchaser not to press requisitions which the law allows him to make.

All this shews that contracts for purchase of lands should contain something more than can be found in the short and meagre form of an ordinary letter.

When we come to a contract for a lease the case is still stronger. When you bargain for a lease simply, it is for an ordinary lease and nothing more; that is, a lease containing the usual covenants and nothing more; but when the bargain is for a lease which is to be formally prepared, in general no solicitor would, unless actually bound by the contract, prepare a lease not containing other covenants besides, that is, covenants which are not comprised in or understood by the term 'usual covenants.' It is then only

rational to suppose that when a man says there shall be a formal contract approved for a lease, he means that more shall be put into the lease than the law generally allows. Now, in the present case, the Plaintiff says in effect, 'I agree to grant you a lease on certain terms, but subject to something else being approved.' He does not say, 'Nothing more shall be required beyond what I have already mentioned,' but 'something else is required' which is not expressed. That being so, the agreement is uncertain in its terms and consequently cannot be sustained.

The distinction between an agreement which is final in its terms, and therefore binding, and an agreement which is dependent upon a stipulation for a formal contract, is pointed out in the authorities.

I will take only one of them, *Chinnock* v. *Marchioness of Ely* (4 D. J. & S. 638). There Lord *Westbury* says (4 D. J. & S. 645, 646): 'I entirely accept the doctrine . . . that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the *Statute of Frauds*, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties.' Then he goes on, 'But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation.'

That judgment of Lord *Westbury's* did not require any approval, but it was approved of by the Court of Appeal in *Rossiter* v. *Miller* (5 Ch. D. 648).

It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail. The result is, that I must hold that there is no binding contract in this case, and there must therefore be judgment for the Defendant.

CLARKE v. THE GUARDIANS OF THE CUCKFIELD UNION.

'It is now settled that, in the absence of an express statutory provision requiring a contract under seal, the requirement of the corporate seal at common law is subject to this exception. Wherever the purposes for which a corporation is created render it necessary that work shall be done or goods supplied to carry such purposes into effect, and orders are given at a corporate meeting regularly constituted and having power to make contracts authorized and necessary for the purposes for which the corporation is created, and the work is done or goods supplied and accepted by the corporation and the whole consideration for the payment executed, there is a contract to pay implied from the acts of the corporation, and the corporation cannot keep the goods or the benefit and refuse to pay on the ground of mere absence of a formality, or that the fixing of the seal was wanting.'—Per Joyce, J., in *Douglass* v. *Rhyl Urban Council* [1913] 2 Ch. at p. 414.

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THIS was a motion, on the part of the defendants, to enter a nonsuit. The action was debt for goods sold and delivered, and for work and labour.

Plea—Never indebted.

The demand was for some water-closets, put up by the plaintiffs at the Cuckfield Union Workhouse, by the direction and with the approbation of the defendants. There was no contract under seal. The plaintiffs obtained a verdict for 12*l.* 15*s.*, with liberty to the defendants to move to enter a nonsuit, on the ground that there was no agreement under seal.

WIGHTMAN, J.—I have deferred giving judgment in this case, which was argued before me some time ago, in the hope that the action, which was for the sum of 12*l.* 15*s.* only, would have been settled; the importance of the question raised being out of all proportion to the amount in difference between the parties. The action was in debt for goods sold, and for work and labour; and upon the trial, before the under-sheriff (the sum demanded being under 20*l.*), the plaintiffs had a verdict for 12*l.* 15*s.*, with liberty reserved for the defendants to move for a nonsuit, on the ground

that there was no contract by the defendants under seal. The demand arose in respect to water-closets, for a new description of which the plaintiffs had obtained a patent, and which were put up by them at the union workhouse, by the direction and with the approbation of the defendants at a meeting of the board, which it was not disputed was regularly constituted. There were several questions that arose in the course of the cause as to the liability of the defendants, which was disputed upon other grounds; but they were all disposed of except that which now remains for consideration, whether assuming the supply of the articles to have been such as was proper and needful for the workhouse, and that the defendants ordered them at the meeting of the board to be furnished by the plaintiffs, and afterwards approved and kept them, and that if they had not been a corporation they would have been liable to pay for them, yet, that as the guardians of the poor are a corporation and sued as such, they are not liable unless they contracted under seal with the plaintiffs. The injustice of allowing the defendants to have the benefit of the work done by the plaintiffs without paying for it, makes it the more necessary to inquire strictly, whether the general rule of law applies to this case, or whether it falls within any exception which may enable the plaintiffs to recover. It is no doubt a rule of law that a corporation aggregate can only contract under seal; so much inconvenience, however, arises from the strict application of the rule, that it was in very early times relaxed with respect to small matters of frequent and ordinary occurrence. The instances are mentioned in *Bac. Abr.* tit. 'Corporations,' E, *Com. Dig.* tit. 'Franchises,' F, 12, 13. This relaxation of the rule has been gradually extended, and it may now be considered that the general rule that a corporation aggregate cannot contract except by deed admits of an exception in cases where the making of a certain description of contracts is necessary and incidental to the purposes for which the corporation was created. In most of the earlier of the modern cases the corporations have been plaintiffs, but those cases were decided upon grounds which would be equally applicable had the actions been against them. In the case of *The London Gaslight and Coke Company* v. *Nicholls* (2 Car. & P. 365) Lord Chief Justice Best held that assumpsit might be maintained by the company for

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gas supplied, observing that ' it was quite absurd to say that there was any necessity for a contract by deed in such a case.' The case of *The Mayor, &c. of Stafford* v. *Till* (4 Bing. 75 ; s. c. 5 Law J. Rep. C. P. 77), and the judgment of the Court in the subsequent case of *The East London Waterworks Company* v. *Bailey* (4 Ibid. 283 ; s. c. 5 Law J. Rep. C. P. 175), are direct authorities that corporations may be parties to contracts not under seal. In the latter case, the Lord Chief Justice Best took a distinction between executory and executed contracts, which has not, however, been recognized in subsequent cases, considering that if the contract were executed, the law would imply a promise, and no deed was necessary, as was decided in the case of *The Mayor of Stafford* v. *Till*. The power of a corporation, for a particular purpose, to maintain an action of assumpsit for breach of an executory contract connected with the purpose for which the company was constituted, was elaborately argued and deliberately determined in the case of *Church* v. *the Imperial Gaslight and Coke Company*, in error. In that case the company had brought an action against Church upon an executory contract by them to supply gas, which the defendant (Church) refused to accept. In giving the judgment of the Court, Lord Denman assumes that it is established that a corporation may sue or be sued in assumpsit upon executed contracts of a certain kind, amongst which are included such as relate to the supply of articles essential to the purposes for which it is created ; and he then considers that there is no sound distinction to be taken in respect of such contracts between those that are executed and those that are executory. In repudiating this distinction, the Court of Queen's Bench differed from the judgment of the Court of Common Pleas, in the case of *The East London Waterworks* v. *Bailey*, but in other respects they agreed in that decision. The case of *Beverley* v. *the Lincoln Gaslight and Coke Company*, decided about the same time, is more directly in point, as the action in that case was indebitatus assumpsit for goods sold and delivered against the company. The action was for the price of gas-meters, supplied by the plaintiff to the company under a parol contract. All the previous cases were considered by the Court of Queen's Bench in an elaborate judgment for the plaintiff, in which it was decided that the action was maintainable, and the company liable though there was no

contract by deed. In *The Mayor of Ludlow* v. *Charlton*, decided subsequently to the cases of *Beverley* v. *the Lincoln Gas Company* and *Church* v. *the Imperial Gas Company*, the Court of Exchequer held that a municipal corporation cannot contract to pay money out of the corporation funds for improvements in the borough except under seal, on the ground that such a contract was not within any of the exceptions to the general rule, nor of ordinary occurrence, or directly necessary for the purposes for which the corporation was instituted. Upon the same ground, the Court of Queen's Bench held, in the subsequent case of *Paine* v. *the Strand Union*, that the plaintiff, who brought an action of assumpsit for work and labour against the guardians of the poor of the Strand Union, to recover a demand for making a plan of one of the parishes in the union, by direction of the board of guardians, but without any contract under seal, was not entitled to enforce such demand, as the making the plan of a particular parish was not necessary for the guardians of the union generally, nor incident to the purposes for which they were incorporated. But in the subsequent case of *Sanders* v. *the Guardians of St. Neot's Union*, the Court held that an action of assumpsit for goods sold, and work and labour, was maintainable in respect of a demand by the plaintiff for iron grates, supplied to the workhouse by the direction of the guardians, and executed there under a verbal order; and in giving judgment, Lord Denman observes, that the defendants could not be permitted to take the objection that there was no contract under seal, if the work, when done, was adopted by them for purposes connected with the corporation. In the late case of the *Copper Miners Company* v. *Fox* it was held, that the company could not maintain an action on an executory parol contract relating to the furnishing of *iron* rails, on the ground that the contract was not incidental or ancillary to carrying on the business of copper miners, and did not fall within any of the exceptions to the general rule, that a corporation can only bind itself by deed. In giving judgment, Lord Campbell observed, that 'had the subject-matter of this contract been copper, or if it had been shewn in any way to have been incidental or ancillary to carrying on the business of copper miners, the contract would have been binding, though not under seal; for where a trading company is created by charter, whilst acting within the scope of the charter,

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it may enter into the commercial contracts usual in such a business in the usual manner.' The result of the cases to which I have referred appears to be, that whenever a corporation is created for particular purposes, which involve the necessity for frequently entering into contracts for goods or works essentially necessary for carrying the purposes for which the corporation is created into execution, a demand in respect of goods or works which have actually been supplied to and accepted by the corporation, and of which they have had the full benefit, may be enforced by action of assumpsit, and the corporation will be liable though the contract was by parol only, and not by deed. There is, however, a case decided by the Court of Exchequer upon deliberate consideration given, which I find it very difficult to reconcile with many of the authorities, and with what I have stated to be the result of the cases to which I have referred. I allude to the case of *Lamprell* v. *the Billericay Union*. That was an action of covenant against the guardians of the union to recover the price to be paid, according to the deed, for work done, under a specification, in building a workhouse, and for extra work. The deed provided that no extra work should be allowed for unless done by direction in writing of certain surveyors named in the deed; much extra work was done under the direction of and adopted by the defendants and their surveyor, but no written directions were given, and the extra work could not be recovered under the deed. The defendants had made many payments on account generally in the progress of the work; and the plaintiffs proposed to appropriate those payments to the discharge of this claim for extra work; and it was upon the appropriation of payments that this question arose. The Court considered that, to entitle the plaintiff to appropriate the payments, he must shew that there were two debts; one under the deed, and the other under a parol contract for payment for the extra work, to be implied from its being done with their assent, and they having adopted and taken the benefit of it; but the Court held, that no such contract could be implied in this case, as the defendants were a corporation, and incapable of making such a contract as that for the extra work by parol. The Court, in that case, considered, that notwithstanding the nature of the corporation and the purposes for which it existed, it was incapable of contracting otherwise than by deed, even for such purposes as

those in question, which were absolutely necessary for carrying into effect the objects of the corporation. The ground upon which a seal is required to authenticate the acts of corporations is stated in the case of *The Mayor of Ludlow* v. *Charlton*; it is required as indicating the concurrence of the whole body corporate. 'The seal is the only authentic evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerously attended, is not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else.' This, no doubt, is strictly applicable to municipal corporations, and others of a similar character, but not so clearly to such a corporation as the guardians of a union. By the 4 & 5 Will. 4. c. 76. ss. 21, 23, and 38, guardians of a union have the government of the workhouse; and there is a general provision that no acts of the guardians shall be valid except at a board when three are present. By the 5 & 6 Will. 4. c. 69. s. 7, for the more easy execution of that act, and of the laws relating to the poor, the guardians of the poor of every union are made a corporation, and may use a common seal. There is, however, no alteration in the law as to the power of the guardians at a board of not less than three. A board of three persons only would have power, both before and after the guardians were made a corporation, to do all such acts as the whole body might do before they were a corporation; and might make all such contracts by parol as were necessary for the purpose of exercising the powers given to them by the statutes; but, after they were made a corporation for the more easy execution of the law relating to the poor, it would seem from that case that they can do no act, except the most trivial, nor make any contract except under seal. The case of *Lamprell* v. *the Billericay Union* was followed by two others in the same court, that of *Diggle* v. *the London and Blackwall Railway Company*, and *Homersham* v. *the Wolverhampton Waterworks Company* (6 Exch. Rep. 137; s. c. 20 Law J. Rep. (N. S.) Exch. 193). In *Diggle* v. *the London and Blackwall Railway Company* it was held that assumpsit for work and labour and materials could not be maintained against a railway company upon a parol contract, though the demand was in respect of taking up old rails and substituting new ones; and it was decided upon the same ground. *Homersham* v. *the Wolverhampton Waterworks Company*

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was a case very similar to the last; the demand was for extra work under an implied contract, there being no express contract entered into by three directors, as required by the 8 & 9 Vict. c. 16. s. 97. These three cases, and especially that of *Lamprell* v. *the Billericay Union*, are undoubtedly adverse to the claim of the plaintiffs in the present case, and I find it difficult to draw any substantial distinction between them upon the point in question. I may, however, observe that the Court in *Lamprell* v. *the Billericay Union* refer to the cases of *The Mayor of Ludlow* v. *Charlton*, *Arnold* v. *the Mayor*, *&c. of Poole* (4 Man. & G. 860; s. c. 12 Law J. Rep. (N. S.) C. P. 97), and *Paine* v. *the Strand Union*, as the authorities upon which they rely for the principle of their decision, without adverting to that which seems, according to other authorities, an important and distinguishing circumstance in those cases, that in none of them was the subject-matter of the contract necessary or essential to the very purposes for which the corporation was erected; nor is the peculiarity of the constitution of such a corporation as the guardians of an union, the object of its creation, and the power of a quorum at a board meeting, adverted to. It may be further remarked, that the case of *Arnold* v. *the Mayor of Poole* appears to be an authority against the decision in *Lamprell* v. *the Billericay Union*, upon the point of appropriation of the payments. The reason for which a seal was required to authenticate the acts of a corporation seems hardly to exist in much force in respect to the guardians of a poor law union, who by the statute by which they were originally constituted act by resolutions at a board composed of not less than three. In the present case there is sufficient evidence that the work was ordered at a board of the guardians regularly constituted; that it was performed and adopted, and nothing remained but to pay for it; but the alleged contract under which it was done, though entered into by the proper authority, was verbal only. I greatly regret the present state of the law upon a subject so important. It would, perhaps, have been better, and have avoided the uncertainty which now exists, if the old rule had never been relaxed; but being as it is, the question is whether the demand in question comes within any of the recognized exceptions to the general rule. I am disposed to think it does, and that wherever the purposes for which a corporation is created render it necessary

that work should be done or goods supplied to carry such purposes into effect, as in the case of the guardians of a poor law union, and orders are given at a board regularly constituted, and having general authority to make contracts for work or goods necessary for the purposes for which the corporation was created, and the work is done, or goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit, and refuse to pay on the ground that though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed or of affixing the seal were wanting, and then say, no action lies, we are not competent to make a parol contract, and we avail ourselves of our own disability. I come to this conclusion (though not without much doubt from the authorities in some respects contrary), as I think it is warranted by the cases of *Sanders* v. *the Guardians of St. Neot's*, *Beverley* v. *the Lincoln Gaslight and Coke Company*, *Church* v. *the Imperial Gaslight and Coke Company*, and others of the cases to which I have adverted, by the peculiar constitution and purposes of such a corporation as the board of guardians, and by the apparent justice of the case. I, therefore, think that the rule should be discharged.

Rule discharged.

[The cases cited without references in the foregoing judgment are reported as follows: *Church* v. *the Imperial Gaslight and Coke Co.* 6 Ad. & E. 846; *Beverley* v. *the Lincoln Gaslight and Coke Co.* 6 Ad. & E. 829; *Mayor of Ludlow* v. *Charlton* 6 M. & W. 815; *Paine* v. *the Strand Union* 8 Q. B. 326; *Sanders* v. *the Guardians of St Neot's Union* 8 Q. B. 810; *Copper Miners Co.* v. *Fox* 20 L. J. Q. B. 174; *Lamprell* v. *the Billericay Union* 3 Exch. 283; *Diggle* v. *the London and Blackwall Ry. Co.* 5 Exch. 442. (Edd.)]

STATUTE OF FRAUDS, 1677, SECTION 4, AND SALE OF GOODS ACT, 1893, SECTION 4

BUXTON v. RUST.

'Now the note or memorandum under sec. 4 of the Statute of Frauds must contain the names of the parties, the subject-matter of the contract and its terms, and the consideration, and the mere fact that the parties may have agreed at the time or subsequently to the agreement in question that a more formal document should be prepared is not sufficient to prevent the contract being sued upon, if they in fact intended to bind themselves by a contract the terms of which are contained in the note or memorandum in question signed by the party to be charged or his agent.'—Per Astbury, J., in *Morrell* v. *Studd and Millington* [1913] 2 Ch. at p. 658.

BUXTON *v.* RUST (1871) L. R. 7 Ex. 1

THIS was an action for the non-delivery of wool, under a contract between the plaintiff and the defendant. The defendant, amongst other pleas, denied the contract.

At the trial before Pigott, B., at the Middlesex sittings, in Trinity Term, 1871, the following facts were proved:

The plaintiff is a dealer in wool in London, and the defendant a farmer and cattle dealer, at Little Leighs, near Braintree. On the 11th of January, 1871, the parties met at Braintree, and entered into a contract for the purchase by the plaintiff from the defendant of some wool. The following memorandum, containing the terms which had been agreed upon, was drawn up and signed by the plaintiff, and handed to the defendant:—

'Bought Mr. G. J. Rust's (the defendant's) wool as examined, at 15*d.* per pound, net cash; greasy and damaged, at 12*d.* per pound, net cash; to be weighed and paid for on the premises, one half; and the whole to be cleared in about twenty-one days. The wool to be delivered at the Chelmsford railway station free of charge, net weight.' The wool was worth 150*l.*

On the 7th of February the plaintiff intimated to the defendant that he was coming to Braintree to weigh and pay for the wool, whereupon the defendant, on the 8th of February, wrote him thus: 'It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business

to put it off like this; therefore I shall consider the deal off as you have not completed your part of the contract. I shall now sell the wool to you again at a difference price, or shall sell it to some one else. At the same time I shall be at Braintree to-morrow, Thursday, at eleven o'clock, ready for a fresh deal if you please to come; but do as you please about it. Yours, G. J. Rust.' The plaintiff had started to weigh the wool before this letter reached him, and on reaching Braintree the defendant told him verbally he could not have the wool. At the same interview the plaintiff asked for a copy of the contract, and the next day received the following letter from the defendant signed by him:—'9th February. Dear Sir, I beg to enclose copy of your letter of the 11th January, 1871' [here followed a copy of the memorandum of the 11th of January]. The plaintiff subsequently applied to the defendant for delivery of the wool, but the defendant took no notice of the application. This action was then brought.

It was contended that the defendant was not liable, inasmuch as there was no sufficient memorandum in writing of the contract signed by him to satisfy the Statute of Frauds, s. 17. The learned judge ruled that there was, and asked the jury whether the plaintiff, although more than the actual twenty-one days had elapsed, had fulfilled his part of the contract. The jury found that he had, and a verdict was entered for him for 150*l*., with leave to move to enter a verdict for the defendant.

A rule was accordingly obtained on the ground that there was no memorandum signed by the defendant sufficient to satisfy the Statute of Frauds (29 Car. 2, c. 3), s. 17.

MARTIN, B.—I am of opinion that the judge's ruling in this case was right. It appears that, on the 11th of January, the plaintiff and defendant met and made a bargain for the purchase, by the plaintiff from the defendant, of some wool; and as the purchase money was more than 10*l*., it was necessary that the terms of the bargain should be evidenced by writing. Accordingly, a memorandum was drawn up and signed by the plaintiff, and handed by him to the defendant, which, we must take it, correctly represented what the contract really was, and according to which the wool was to be cleared in 'about twenty-one days.'

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On the 8th of February, more than the actual period of twenty-one days having elapsed, the defendant wrote the plaintiff a letter in which he says: 'It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this; therefore I shall consider the deal off, as you have not completed your part of the contract.' Now what is the true meaning of this? Can it be anything but this: 'You and I have a contract'—for a 'deal' must mean a contract—'and according to my reading of one of the terms of it, you have not completed your part, and so I give you notice that it is off.' Then the parties met, and the plaintiff asked for a copy of the 'contract;' and the defendant in reply, on the 9th of February, wrote as follows: 'I beg to enclose copy of your letter of the 11th January, 1871' [then followed a copy of the memorandum]. Now it is said that because the defendant uses the words 'copy of your *letter*' he has not recognized the existence of the contract contained in the enclosed memorandum. I cannot take this view of the matter. But, at all events, taking the two letters of the defendant together, I think they amount to a recognition by him that there was a contract with the plaintiff on the true construction of which he thought that he was free, and that the memorandum of the 11th of January contained the terms of that contract. This being so, s. 17 of the Statute of Frauds is satisfied; for it has been frequently held that all that is necessary is to shew written evidence of the true terms of the bargain, signed by the party to be charged. Here, it seems to me, there was ample evidence effectually to bind the defendant.

With regard to the cases cited for the defendant, they are, in my judgment, perfectly correct; and I do not think my conclusion in the present case is contrary to any of them. No doubt attempts have often been made to make some writing, never intended to be, or to recognize, a contract—such, for example, as an invoice—binding on the persons signing it. A writing of that character has rightly been held insufficient. But here the defendant has signed documents which unequivocally recognize the existence of a contract in the terms of the memorandum, and it is consistent with all the authorities to hold that signature enough to satisfy the statute.

CHANNELL and CLEASBY, B.B., delivered judgments to the same effect. On appeal to the Court of Exchequer Chamber (L. R. 7 Ex. 279) the judgment was affirmed. BUXTON v. RUST.

'These authorities seem to me to establish the following propositions: (1) The doctrine of part performance of a parol agreement, which enables proof of it to be given notwithstanding the *Statute of Frauds*, though principally applied in the case of contracts for the sale or purchase of land, or for the acquisition of an interest in land, has not been confined to those cases. (2) Probably it would be more accurate to say it applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing. (3) The most obvious case of part performance is where the defendant is in possession of land of the plaintiff under the parol agreement. (4) The reason for the rule is that where the defendant has stood by and allowed the plaintiff to fulfil his part of the contract, it would be fraudulent to set up the statute. (5) But this reason applies wherever the defendant has obtained and is in possession of some substantial advantage under a parol agreement which, if in writing, would be such as the Court would direct to be specifically performed. (6) The doctrine applies to a parol agreement for an easement, though no interest in land is intended to be acquired.'—Per Kay, J., in *McManus* v. *Cooke* (1887) 35 Ch. D. at p. 697. MADDISON v. ALDERSON. — Earl of Selborne, L.C.

MADDISON *v.* ALDERSON (1883) 8 App. Cas. 467

EARL OF SELBORNE, L.C.—My Lords, the appellant in this case lived for many years, as housekeeper, in the service of Thomas Alderson, who died on the 16th of December 1877. She originally entered his service in 1845, and having become his housekeeper some years before 1860, continued to serve him in that capacity down to the time of his death. He was, when he died, the owner in fee simple of a freehold estate at Moulton, in Yorkshire, called the Manor House Farm, in extent about ninety-two acres, and in value about £137 per annum, which had been devised to him by the will of an uncle, who died in 1863. It is certain that he intended to leave the appellant (subject to a small annuity) a life interest in this estate, for he had a will prepared for that purpose in 1872, which he signed in 1874, and which only failed for want of due attestation.

The appellant having possessed herself of the title deeds, the heir-at-law, to whom the estate descended, brought the present action to recover them; and she by her statement of defence

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and counter-claim insisted that she was entitled to the same benefit which she would have taken under the will, if duly executed, by virtue of a parol agreement alleged to have been made with her by her master for sufficient consideration, and to have been on her part performed. I do not think it necessary to read the averments contained in the 3rd, 4th and 5th paragraphs of her pleading, because, so far as the facts are concerned, they must now be taken from the verdict of the jury, together with the Judge's notes of the evidence at the trial, if (as seems to have been assumed in both the Courts below) that evidence, as well as the verdict, may be regarded. Whether that assumption was correct or not is in my view immaterial, because in either view my own conclusion would be the same.

The question which (at the instance of the appellant's counsel, and without objection from the respondent) was left by Mr. Justice Stephen to the jury, was 'whether the defendant was induced to serve Thomas Alderson as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by a promise, made by him to her, to make a will, leaving her a life estate in Moulton Manor Farm, if and when it became his property?' That question the jury answered in the affirmative. The evidence on which the verdict proceeded was that of the appellant herself, without any corroboration other than the unattested will, which made no mention of any such inducement. I abstain from stating her evidence in detail, because, in the condensed form in which it appears upon the judge's notes, it certainly does not go beyond (if indeed it is sufficient to justify) the verdict. The material parts of it were to this effect:— That the appellant, having been long (as already stated) in Thomas Alderson's service, contemplated leaving him, and had some idea of being married, in May, 1860, and so informed him. She had ten years before 'begun to leave wages in his hand;' the arrear went on from that time, owing to his straitened circumstances; and, in May, 1860, £23 7*s*. 6*d*. remained due to her. He told her of his expectations from his uncle, and that his uncle wished her to stay with him as long as he lived, and wished him to 'make her all right' by leaving her the Moulton Manor Farm, which he promised to do if she lived with him. 'And so therefore' (she said) 'I took his advice, and I remained on by

his promises ;' (in another place, 'I did not leave, because he advised me not'). She did not afterwards 'press him' for wages ; but, after his death, she brought an action against his administrator for them, which was dropped (as I understand) before or at the time when the present action was commenced. When he signed his will, he read it over to her and asked whether it was right, and 'whether she was satisfied.'

The case, thus presented, was manifestly one of conduct on the part of the appellant (affecting her arrangements in life and pecuniary interests) induced by promises of her master to leave her a life estate in the Moulton Manor Farm by will, rather than one of definite contract, for mutual considerations, made between herself and him at any particular time. There was certainly no contract on her part which she would have broken by voluntarily leaving his service at any time during his life ; and I see no evidence of any agreement by her to serve without, or to release her claim to, wages. If there was a contract on his part, it was conditional upon, and in consideration of, a series of acts to be done by her, which she was at liberty to do, or not to do, as she thought fit ; and which, if done, would extend over the whole remainder of his life. If he had dismissed her, I do not see how she could have brought any action at law, or obtained any relief in equity.

It was admitted, in the argument at the bar, that the appellant had endeavoured to bring her case within the supposed authority of *Loffus* v. *Maw* (3 Giff. 592), decided by Vice-Chancellor Stuart (under circumstances not dissimilar) on the doctrine of representation ; for which purpose the Vice-Chancellor relied upon some expressions used by Lord Cottenham in *Hammersley* v. *De Biel* (12 Cl. & F. 45, at p. 62 n.), and considered himself at liberty to disregard the reasons assigned by Lord Cranworth and Lord Brougham for the later decision of this House in *Jorden* v. *Money* (5 H. L. C. 185). Mr. Justice Stephen and the Court of Appeal (rightly in my opinion) took a different view. I have always understood it to have been decided in *Jorden* v. *Money* (5 H. L. C. 185) that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts :—

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a distinction which is illustrated by such cases as *Prole* v. *Soady* (2 Giff. 1), and *Piggott* v. *Stratton* (1 D. F. & J. 33). *Hammersley* v. *De Beil* (12 Cl. & F. 45) was a case of contract for valuable consideration, duly signed so as to fulfil the requirements of the Statute of Frauds, in the view both of Lords Langdale and Cottenham in Chancery, and of Lord Campbell in the House of Lords (12 Cl. & F. 63, 64 n. and 87; 3 Beav. 474–6). Those decisions are consistent with each other; *Hammersley* v. *De Biel* (12 Cl. & F. 45) does not justify, and *Jorden* v. *Money* (5 H. L. C. 185) is irreconcilable with, the reasons stated by the Vice-Chancellor for his judgment in *Loffus* v. *Maw* (3 Giff. 592).

Mr. Justice Stephen and the Court of Appeal arrived at the conclusion that a contract was proved in this case (notwithstanding the character of the evidence and the form of the verdict), on which, but for the Statute of Frauds, the appellant might have been entitled to relief; but they differed on the question of part performance, Mr. Justice Stephen thinking that there was part performance sufficient to take the case out of the Statute of Frauds, the Court of Appeal thinking otherwise. This makes it necessary for your Lordships now to examine the doctrine of equity as to part performance of parol contracts.

The cases upon this subject (which are very numerous) have all, or nearly all, arisen under those words of the 4th section of the Statute of Frauds, which provide that 'no action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.' It has been recently decided by the Court of Appeal in *Britain* v. *Rossiter* (11 Q. B. D. 123) that the equity of part performance does not extend, and ought not to be extended, to contracts concerning any other subject-matter than land; an opinion which seems to differ from that of Lord Cottenham (see *Hammersley* v. *De Biel* (12 Cl. & F. 64 n.), and *Lassence* v. *Tierney* (1 Mac. & G. 572)). That equity has been stated by high authority to rest upon the principle of fraud: 'Courts of Equity will not permit the statute to be made an instrument of fraud.' By this it cannot

be meant that equity will relieve against a public statute of general policy in cases admitted to fall within it ; and I agree with an observation made by Lord Justice Cotton, in *Britain* v. *Rossiter* (11 Q. B. D. 130), that this summary way of stating the principle (however true it may be when properly understood) is not an adequate explanation, either of the precise grounds, or of the established limits, of the equitable doctrine of part performance.

It has been determined at law (and, in this respect, there can be no difference between law and equity), that the 4th section of the Statute of Frauds does not avoid parol contracts, but only bars the legal remedies by which they might otherwise have been enforced : *Crosby* v. *Wadsworth* (6 East, 602, 611) ; *Leroux* v. *Brown* (12 C. B. 824) ; *Britain* v. *Rossiter* (11 Q. B. D. 123). *Crosby* v. *Wadsworth* (6 East, 602, 611) was an action of trespass brought by the purchaser against the vendor of a growing crop. The contract was by parol, and it was held to be concerning an interest in land, within the 4th section of the statute. ' But ' (said Lord Ellenborough) ' the statute does not expressly and immediately vacate such contracts, if made by parol ; it only precludes the bringing of actions to enforce them by charging the contracting party, or his representatives, on the ground of such contract, and of some supposed breach thereof ; which description of action does not properly apply to the one now brought, viz., a mere general action of trespass, complaining of an injury to the possession of the plaintiff, however acquired, by contract or otherwise. But although the contract for this interest in or concerning land may not be in itself wholly void under the statute, merely on account of its being by parol (so that, if the same had been executed, the parties could have treated it as a nullity), yet, being executory, and as for the non-performance of it no action could have been, by the provisions of the 4th section, maintained, we think it might be discharged before anything was done under it which could amount to a part execution of it.'

From the law thus stated the equitable consequences of the part performance of a parol contract concerning land seem to me naturally to result. In a suit founded on such part performance, the defendant is really ' charged ' upon the equities resulting

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from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself.[1] If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase-money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any Court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from res gestæ subsequent to and arising out of the contract. So

[1] In Lord Blackburn's judgment in the same case at p. 489 a somewhat different explanation of the relation of the doctrine of part performance to the Statute is given; he suggests that in effect the doctrine requires the 4th section to be construed as if it contained the words 'or unless possession of the land shall be given or accepted.' 'Notwithstanding,' he says, 'the very high authority of those who have decided those cases, I should not hesitate if it was res integra in refusing to interpolate such words, or put such a construction on the statute. But it is not res integra, and I think that the cases are so numerous that this anomaly, if as I think it is an anomaly, must be taken as to some extent at least established. If it was originally an error, it is now I think communis error and so makes the law.' [Edd.]

long as the connexion of those res gestæ with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the res gestæ themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement.

It is not in England only that such a doctrine prevails; a similar (perhaps even a larger) equity is also recognised in other countries, whose equitable jurisprudence is derived from the same original sources as our own. By the law of Scotland, 'written contracts in strict technical language are those of which authentic written evidence is required, not merely in proof, but in solemnity; as obligations relative to land; or obligations agreed to be reduced to writing; *or those required by statute to be in writing.*' To constitute any such contract there must be a 'final engagement;' and as a corollary to that rule a 'locus penitentiæ' is given; i. e., 'a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite and has not yet been adhibited in an authentic shape.' But to this, 'rei interventus raises a personal exception, which excludes the plea of locus penitentiæ. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocably referable to the contract and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable:' Bell's Principles, ss. 18, 25, 26.

This must I think have been the principle on which the House of Lords proceeded in 1701 when it reversed the decree of Lord Somers in *Lester* v. *Foxcroft* (Colles Par. Cas. 108). Lord Redesdale in *Clinan* v. *Cooke* (1 Sch. & Lef. 22) and *Bond* v. *Hopkins* (1 Sch. & Lef. 433) referred to that case as if it had been the earliest decision on the subject. But there were, in fact, two prior cases before Lord Guilford—*Hollis* v. *Edwards* (1 Vern. 159) and *Butcher* v. *Stapely* (1 Vern. 363) decided in 1683 and 1685, within the first ten years after the enactment of the Statute of Frauds, in the earlier of which the Lord Keeper had refused, and in the latter

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had granted, relief. *Butcher* v. *Stapely* (1 Vern. 363) was a strong case upon its circumstances; for the relief was there granted to a purchaser in possession of land under an unsigned agreement, against a subsequent purchaser (with notice) of the same land from the vendor, the defendant having paid his purchase-money under a signed agreement and having obtained a conveyance of the legal estate. Lord Guilford 'declared that inasmuch as possession was delivered according to the agreement *he took the bargain to be executed.*'

Among later cases I may refer to *Pengall* v. *Ross* (2 Eq. C. Ab. 46), decided by Lord Cowper in 1709; *Lockey* v. *Lockey* (Prec. Ch. 519), by Lord Macclesfield in 1719; and *Potter* v. *Potter* (1 Ves. Sen. 441), by Strange, Master of the Rolls, in 1750. 'There must be something,' said Lord Cowper (2 Eq. C. Ab. 46), 'more than a bare payment of money on the one part to induce the Court to decree a specific performance on the other part, either by putting it out of the party's power to undo the thing, or where it would be a prejudice to the party performing his part, as beginning to build, or letting the other into possession, &c.—in such case, where the agreement hath proceeded so far on one part, the statute never intended to restrain this Court from decreeing a performance of the other.' Lord Macclesfield said (Prec. Ch. 519) that an unwritten agreement 'if executed on one part, had been always looked upon so far conclusive as to induce the Court to decree an execution on the other part, *not to destroy or avoid the agreement so far as it was already carried into execution.*' Sir John Strange (1 Ves. Sen. 441) said, 'If confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such, in equity.'

The doctrine, however, so established has been confined by judges of the greatest authority within limits intended to prevent a recurrence of the mischief which the statute was passed to suppress. The present case, resting entirely upon the parol evidence of one of the parties to the transaction, after the death of the other, forcibly illustrates the wisdom of the rule, which requires some evidentia rei to connect the alleged part performance with the alleged agreement. There is not otherwise enough in the situation in which the parties are found to raise questions which may not be solved without recourse to equity. It is not

enough that an act done should be a condition of, or good consideration for, a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject-matter of the contract.

Lord Hardwicke in *Gunter* v. *Halsey* (Amb. 586) said: 'As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement' ('the terms of which,' he added, 'must be certainly proved'). He thought it indeed consistent with that rule to treat the payment of purchase-money, in whole or in part, as a sufficient part performance: *Lacon* v. *Mertens* (3 Atk. 1); *Owen* v. *Davies*, 1747 (1 Ves. Sen. 83). This Lord Cowper in *Pengall* v. *Ross* (2 Eq. C. Ab. 46), and Lord Macclesfield in *Seagood* v. *Meale* (Prec. Ch. 561, A. D. 1721) had refused to do. On that point later authorities have overruled Lord Hardwicke's opinion; and it may be taken as now settled that part payment of purchase-money is not enough; and judges of high authority have said the same even of payment in full: *Clinan* v. *Cooke* (1 Sch. & Lef. 40); *Hughes* v. *Morris* (2 D. M. & G. 356); *Britain* v. *Rossiter* (11 Q. B. D. 123). Some of the reasons which have been given for that conclusion are not satisfactory; the best explanation of it seems to be, that the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land. I am not aware of any case in which the whole purchase-money has been paid without delivery of possession, nor is such a case at all likely to happen. All the authorities shew that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged: *Cooth* v. *Jackson* (6 Ves. 38); *Frame* v. *Dawson* (14 Ves. 386); *Morphett* v. *Jones* (1 Sw. 181). 'The acknowledged possession' (said Sir T. Plumer in *Morphett* v. *Jones* (1 Sw. 181)) 'of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms, the Court regarding what has been done as a consequence of contract or tenure.'

'It is in general,' said Sir James Wigram (*Dale* v. *Hamilton* (5 Hare, 381)) 'of the essence of such an act that the Court shall,

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by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract.... But an act which though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the Statute of Frauds; as for example, the payment of a sum of money alleged to be purchase money. The fraud, in a moral point of view, may be as great in the one case as in the other, but in the latter cases the Court does not in general give relief': (see also *Britain* v. *Rossiter* (11 Q. B. D. at p. 130), per Lord Justice Cotton.) The acts of part performance, exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been (almost, if not quite, universally) relative to the possession, use, or tenure of the land. The law of equitable mortgage by deposit of title deeds depends upon the same principles.

Examples of circumstances which have been held insufficient for this purpose are found in 1. *Clerk* v. *Wright* (1 Atk. 13) and *Whaley* v. *Bagenal* (1 Bro. P. C. 345), where acts preparatory to the completion of a contract were held not to be part performance; 2. *Wills* v. *Stradling* (3 Ves. 381), where the mere holding over by a tenant (unless qualified by the payment of a different rent) was held not to be enough 'even to call for an answer;' 3. *Lamas* v. *Bayley* (2 Vern. 627), where the plaintiff, being engaged in a treaty for the purchase of land, desisted in order that the defendant might buy it, on an agreement that he should have part of it when so bought at a proportionate price; but his 'desisting from the prosecution of his purchase,' was held to be no part performance; and 4. *O'Reilly* v. *Thompson* (2 Cox, 271), where the agreement alleged was that upon the plaintiff obtaining from a third party a release of a right to a lease claimed by him, the defendant would grant to the plaintiff a lease of the same premises on certain terms. The plaintiff did obtain a release from the party in question of the right claimed by him for valuable consideration; but, nevertheless, a plea of the Statute of Frauds was allowed, Chief Baron Eyre saying, 'These circumstances are not a sufficient part performance, but they are a condition annexed,

and necessary to be fulfilled by the plaintiff to entitle him to call for an execution of the contract : ' meaning, as I presume, that they were a condition precedent to the contract, as distinguished from acts done after a concluded contract, and in part performance of it.

The law deducible from these authorities is, in my opinion, fatal to the appellant's case. Her mere continuance in Thomas Alderson's service, though without any actual payment of wages, was not such an act as to be in itself evidence of a new contract, much less of a contract concerning her master's land. It was explicable, without supposing any such new contract, as easily as the continuance of a tenant in possession after the expiration of a lease. The relinquishment of any chance which she might have had of marriage was of no greater force than the relinquishment of the treaty for purchase in *Lamas* v. *Bayley* (2 Vern. 627). The alleged acts of part performance preceded, and therefore could not be evidence of, any contract on her part ; their per formance was (as in *O'Reilly* v. *Thompson* (2 Cox, 271)) a condition precedent, without the fulfilment of which the promise which the jury found to have been made by Thomas Alderson could not on his part become a binding contract.

Two cases, on which I think it well to add some remarks, were cited by the learned counsel for the appellant, as favourable to their argument, *Walker* v. *Walker* (2 Atk. 98), and *Parker* v. *Smith* (1 Coll. 608).

In *Walker* v. *Walker* (2 Atk. 98) Lord Hardwicke did not execute any parol contract on the ground of part performance, or otherwise ; all that he did was, to relieve the defendant from a liability which the plaintiff's conduct had made it inequitable to enforce. There had been a parol agreement between A. and B., that A. would surrender a copyhold belonging to him to C., charged with annuities in favour of B., if B. would surrender another copyhold of his own to C. A. surrendered his copyhold accordingly, charged with the annuities, and died ; B. did not surrender ; but he sought nevertheless by his bill to enforce payment of the annuities against C. Lord Hardwicke dismissed the bill, saying, that ' *he was not clear* ' that the agreement might not have been established by cross bill, upon the principle of part performance. To such a dictum, not even the authority

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of so great a judge can give much weight. It does not appear how, if there had been a binding agreement, C., who was no party to it, could have claimed specific performance. The true equity was that which was actually administered, viz., to relieve A.'s copyhold, in the hands of C., from the charge which B. unconscientiously sought to enforce.

Of the other case (*Parker* v. *Smith* (1 Coll. 608), before Vice-Chancellor Knight Bruce), I think it enough to say, that it was dealt with in an extraordinary manner, and is difficult to reconcile with *Cooth* v. *Jackson* (6 Ves. 38). The acts to which the Court gave the effect of part performance were done before any definite terms of agreement had been, even by parol, concluded between the parties. It might well have been held, that there was an agreement duly signed according to the Statute of Frauds on the 30th of November, 1842; but the supposed acts of part performance were done before that time; and, until then, everything, as to the terms of the intended new lease, remained unsettled. I cannot, therefore, regard *Parker* v. *Smith* (1 Coll. 608) as a satisfactory authority.

I am sorry for the appellant's disappointment, through the ignorance of her late master as to the attestation requisite for a valid testamentary act. But the law cannot be strained for the purpose of relieving her from the consequences of that misfortune. It would, in my opinion, be much strained, and the equitable doctrine of part performance of parol contracts would be extended far beyond those salutary limits within which it has hitherto been confined, if your Lordships were to reverse the order of the Court of Appeal. I should have been glad if that Court had dealt differently with the costs; as she has lost, not only the estate intended for her, but also her wages; but costs were within their discretion, and their decree cannot be altered in that respect, being otherwise correct. This House has also to exercise a discretion as to the costs of this appeal; and I humbly venture to recommend to your Lordships that it should be dismissed without costs.

LORDS O'HAGAN, BLACKBURN, and FITZGERALD agreed with the Lord Chancellor.

Order appealed from affirmed; and appeal dismissed.

'The other and only remaining point is, whether the defendants are responsible by reason of their charging a del credere commission, though they have not guaranteed by writing signed by themselves. We think they are. Doubtless if they had for a percentage guaranteed the debt owing or the performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable without a note in writing signed by them; but being the agents to negotiate the sale, the commission is paid in respect of that employment: a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them: and though it may terminate in the liability to pay the debt of another, that is not the immediate object for which the consideration is given.'—Per Curiam, *Couturier* v. *Hastie* (1852) 8 Ex. at p. 55.

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HARBURG INDIA RUBBER COMB COMPANY *v.* MARTIN [1902] 1 K. B. 778

VAUGHAN WILLIAMS, L.J.—The material facts of this case are very short. The plaintiffs had supplied goods to a company called the Crowdus Accumulator Syndicate. The syndicate did not pay what was due from them for the goods, and the plaintiffs recovered judgment against them, and placed a writ of fi. fa. in the hands of the sheriff to realize the amount of their judgment. The sheriff found that the works of the syndicate had been stopped and their place of business closed, and he did not take possession. After this there was a meeting between the defendant and Mr. Winter, the plaintiffs' agent. A conversation took place at that meeting, and the jury have found that Mr. Winter's account of it is accurate. To put the result of the conversation shortly, the defendant then verbally promised Mr. Winter that he would indorse some bills for the amount of the judgment debt. It is said that amounted to an oral promise to give a guarantee of the judgment debt owing by the syndicate to the plaintiffs.

It is said on behalf of the defendant that this was a promise by him by word of mouth to make himself answerable for the debt of the syndicate. It is said on behalf of the plaintiffs that this was not a promise to make himself answerable for the debt of another—that is, the syndicate—but that it was a contract of

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indemnity, by which, I suppose, is meant a new contract in the nature of an original obligation.

The question which we have to decide is whether this bargain is 'a promise to answer for the debt of another' within s. 4 of the Statute of Frauds. Mathew J. has held that it is not. I am sorry to say that I cannot agree with that conclusion. It seems to me that this contract was as plainly as possible a promise by the defendant to make himself answerable for the debt of the syndicate.

Our attention has been called to a great number of cases in which the Court has treated various transactions as being outside s. 4. Most of the earlier cases were what I may call 'property cases.' They were cases in which either the person who made the promise had property which he wished to relieve from liability, or there was property which he wished to acquire. It is not necessary for me to go through those cases, but I cannot agree that the present case comes within any of that class. The defendant's promise was not, as it seems to me, either a new contract of purchase, or a new contract for the release of any property which either was his or in which he had an interest.

Our attention was next called to the exception which has been established by what I may call the 'del credere cases,' beginning with *Couturier* v. *Hastie* (8 Ex. 40) and coming down to *Sutton & Co.* v. *Grey* ([1894] 1 Q. B. 285). It has been said, and I think truly, that these cases are of a different species from the property cases. I say of a different species, not of a different genus, because I think there is a wider genus, which can be plainly and simply defined, within which both of these species fall. So far as I can see, the authorities have left us with a general rule, which I will attempt to define presently, and each of these two classes of cases falls within that general rule. In each of them, I think, the form of the promise given by the promisor has never been held to be conclusive of the matter. He may, or he may not, promise in terms to answer for the debt of another; but, whether he does so or not, it is the substance, not the form, which is regarded.

Before leaving these instances I wish to mention one other class, which I do not treat as an exception from s. 4, but which, I think, does not come within the section at all. I mean the cases which have been spoken of as 'indemnity cases.' Of course in one sense all guarantees, whether they come within s. 4 or not,

are contracts of indemnity. But the difference between those indemnities which come within the section and those which do not is very shortly thus expressed in the notes to *Forth* v. *Stanton* :[1] 'These cases establish that the statute applies only to promises made to the person to whom another is already or is to become answerable.'

That, to my mind, is an accurate definition of a guarantee or indemnity which comes within s. 4 of the statute, as distinguished from an original liability which is not within the section, and which has no reference to the debt of another, but creates a new liability which is undertaken by the promisor, and has been called in the course of the argument a contract of indemnity. I will not go through these cases at length, but it seems to me that *Guild & Co.* v. *Conrad* ([1894] 2 Q. B. 885), entirely confirms this as being the true view of the distinction between an indemnity and a guarantee which comes within s. 4. That case was decided by Lindley, Lopes, and Davey L.JJ. There the defendant had orally promised the plaintiff that if he would accept certain bills for a firm in which the defendant's son was a partner, the defendant would provide the plaintiff with funds to meet the bills, and it was held (affirming the judgment of Mathew J.) 'that this was a promise of indemnity and not of guarantee, and therefore not required by s. 4 of the Statute of Frauds to be in writing.' Lindley L.J. in the course of his judgment said ([1894] 2 Q. B. at p. 892) : 'The authorities are *Thomas* v. *Cook* ((1828) 8 B. & C. 728 ; 32 R. R. 520) and *Wildes* v. *Dudlow* ((1874) L. R. 19 Eq. 198). *Thomas* v. *Cook* ((1828) 8 B. & C. 728 ; 32 R. R. 520) appears to me to be undistinguishable from this case if the facts here are such as I take them to be.' Then the Lord Justice cited the following passage from the judgment of Parke J. in *Thomas* v. *Cook* ((1828) 8 B. &. C. 728 ; 32 R. R. 520) : 'This was not a promise to answer for the debt, default, or miscarriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same.' And Davey L.J. said ([1894] 2 Q. B. at p. 896) : 'In my opinion, there is a plain distinction between a promise to pay the creditor if the principal debtor makes

[1] Williams' Notes to Saunders, ed. 1871, vol. i, p. 234.

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default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability, independently of the question whether a third person makes default or not.'

It seems to me that those judgments entirely confirm the view which is taken in the note to *Forth* v. *Stanton*,[1] which I have read.

In my judgment, the circumstances of the present case shew plainly that there was a guarantee of the payment of a debt for which the syndicate was primarily liable, and not an original promise by the defendant to keep the plaintiffs indemnified. In my judgment, a contract of indemnity does not come within s. 4, but I think there is nothing to justify us in holding that in the present case the contract is a contract of indemnity. In my opinion, it is a contract of guarantee—' a promise to answer for the debt of another.'

I will now go back to those cases which, so far as the words of the contract are concerned, might come within s. 4, but which have been held not to come within it because of the object of the contract. Whether you look at the ' property cases ' or at the ' del credere cases,' it seems to me that in each of them the conclusion arrived at really was that the contract in question did not fall within the section because of the object of the contract. In each of those cases there was in truth a main contract—a larger contract—and the obligation to pay the debt of another was merely an incident of the larger contract. As I understand those cases, it is not a question of motive—it is a question of object. You must find what it was that the parties were in fact dealing about. What was the subject-matter of the contract? If the subject-matter of the contract was the purchase of property —the relief of property from a liability, the getting rid of incumbrances, the securing greater diligence in the performance of the duty of a factor, or the introduction of business into a stock-broker's office—in all those cases there was a larger matter which was the object of the contract. That being the object of the contract, the mere fact that as an incident to it—not as the immediate object, but indirectly—the debt of another to a third person will be paid, does not bring the case within the section. This definition or rule for ascertaining the kind of cases outside the section covers both ' property cases ' and ' del credere cases.'

[1] Williams' Notes to Saunders, ed. 1871, vol. i, p. 234.

Can we then in the present case find any larger contract? I cannot. It seems to me plain upon the evidence that the only matter which was present to the mind of the defendant, and was presented by him to Mr. Winter, was this: 'Will you forbear for a time? Will you give the syndicate, which I believe has a future before it, an opportunity of turning round? I believe that if it has that opportunity, it will do well and will be able to pay you. And to induce you thus to forbear I will give you bills which shall secure the payment at specified periods of the judgment debt, in case the syndicate does not pay you itself.' That, I think, is the true effect of the conversation, and it seems to me that was the whole of the contract, and there was neither a purchase nor a del credere arrangement, nor anything else beyond that bargain. And the mere fact that the defendant had, as he seems to have done, financed the syndicate to a large extent, and that that was his motive for thus coming forward and bargaining for forbearance, cannot make any difference in the object of the contract. That might have been the motive which induced him to make himself answerable for the debt of the syndicate, but it was not the object of the contract. The object was simply to obtain the forbearance of the creditors in respect of the debt.

It was suggested that the true definition of cases which do not come within s. 4 should be, not those in which the obligation to pay the debt of another is an incident of a larger contract, but those in which the main object is to secure the promisor's own personal interest. But, I think, if such a definition were adopted, there would be nothing left to come within s. 4, because in every case there must be a consideration for which the promisor bargains to come to him from the promisee. That is as true of mere forbearance as of anything else. If the contract is that the promisor will be answerable for the debt due to the promisee if he will forbear, if the main object is to obtain that forbearance, and the promisor wishes to obtain it, that would be sufficient to take the case out of the statute. In my opinion so to hold would be simply to repeal s. 4.

I wish to say a word about *Fitzgerald* v. *Dressler* (7 C. B. (N.S.) 374), which was decided long after *Couturier* v. *Hastie* (8 Ex. 40). In his judgment in *Fitzgerald* v. *Dressler* (7 C. B. (N.S.) 374) Cockburn C.J. quoted the note to *Forth* v. *Stanton* (1 Wms. Saund. 211 e), and expressly approved of it,

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subject to one qualification. The passage which he quoted was this: 'The fair result seems to be that the question, whether each particular case comes within this clause of the statute (s. 4) or not, depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.' The learned judge added: 'I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for, though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz., an absence of prior liability on the part of the defendant or his property, it being, as I think, truly stated there, as the result of the authorities, that, if there be something more than a mere undertaking to pay the debt of another, as, where the property, in consideration of the giving up of which the party enters into the undertaking, is in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking.'

I wish to point out that Cockburn C.J. was there in terms dealing only with the 'property cases' as an instance—and I think it is clear that he intended to deal with them only as an instance—of a general rule. I have attempted to define that general rule, and, I think, that every one of the exceptions which is to be found in the decided cases comes within the rule, as I have defined it.

In my opinion the judgment of Mathew J. should be reversed, and the appeal allowed.

I have said nothing about the question of damages because, in the view which we take, it does not arise.

STIRLING and COZENS-HARDY, L.JJ. delivered judgments to the same effect.

Appeal allowed.

'All contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved.'—Per Skynner, C.B., delivering the opinion of the Judges to the House of Lords in *Rann* v. *Hughes* (1778) 7 T. R. 350 (n).

'Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff; it may be some benefit to the plaintiff, or some detriment to the defendant; but at all events it must be moving from the plaintiff.'—Per Patteson, J., in *Thomas* v. *Thomas* (1842) 2 Q. B. at p. 859.

'A consideration past and executed will support no other promise than such as would be implied by law.'—Per Lord Denman, C.J., in *Roscorla* v. *Thomas* (1842) 3 Q. B. at p. 237.

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ASSUMPSIT. The declaration stated, that one John Sutcliffe made his will, and appointed plaintiff executor thereof, and thereby bequeathed certain property in manner therein mentioned: that he afterwards died without altering his will, leaving one Sarah Sutcliffe, an infant, his daughter and only child and heiress at law surviving: that after making the will John Sutcliffe sold the property mentioned therein, and purchased a piece of land upon which he erected certain cottages, but the same were not completed at the time of his death; which piece of land and cottages were at the time of his death, mortgaged by him; that he died intestate in respect of the same, whereupon the equity of redemption descended to the said infant as heiress at law: that after the death of John Sutcliffe, plaintiff duly proved the will and administered to the estate of the deceased: that from and after the death of John Sutcliffe until the said Sarah Sutcliffe came of full age, plaintiff, executor as aforesaid, 'acted as the guardian and agent' of the said infant, and in that capacity expended large sums of money in and about her maintenance and education, and in and about the completion, management, and

EASTWOOD v. KENYON. necessary improvement of the said cottages and premises in which the said Sarah Sutcliffe was so interested, and in paying the interest of the mortgage money chargeable thereon and otherwise relative thereto, the said expenditure having been made in a prudent and useful manner, and having been beneficial to the interest of the said Sarah Sutcliffe to the full amount thereof: that the estate of John Sutcliffe deceased having been insufficient to allow plaintiff to make the said payments out of it, plaintiff was obliged to advance out of his own monies, and did advance, a large sum, to wit 140*l.*, for the purpose of the said expenditure; and, in order to reimburse himself, was obliged to borrow, and did borrow, the said sum of one A. Blackburn, and, as a security, made his promissory note for payment thereof to the said A. Blackburn or his order on demand with interest; which sum, so secured by the said promissory note, was at the time of the making thereof and still is wholly due and unpaid to the said A. Blackburn: that the said sum was expended by plaintiff in manner aforesaid for the benefit of the said Sarah Sutcliffe, who received all the benefit and advantage thereof, and such expenditure was useful and beneficial to her to the full amount thereof: that when the said Sarah Sutcliffe came of full age she had notice of the premises, and then assented to the loan so raised by plaintiff, and the security so given by him, and requested plaintiff to give up to one J. Stansfield as her agent, the controul and management of the said property, and then promised the plaintiff to pay and discharge the amount of the said note; and thereupon caused one year's interest upon the said sum of 140*l.* to be paid to A. Blackburn. That thereupon plaintiff agreed to give up, and did then give up, the controul and management of the property to the said agent on behalf of the said Sarah Sutcliffe: that all the services of plaintiff were done and given by him for the said Sarah Sutcliffe, and for her benefit, gratuitously and without any fee, benefit, or award whatsoever; and the said services and expenditure were of great benefit to her, and her said property was increased in value by reason thereof to an amount far exceeding the said 140*l.* That afterwards defendant intermarried with the said Sarah Sutcliffe, and had notice of the premises, and the accounts of plaintiff of and concerning the premises were then submitted to defendant, who then examined and assented to the

same, and upon such accounting there was found to be due to plaintiff a large sum of money, to wit, &c., for monies so expended and borrowed by him as aforesaid; and it also then appeared, that plaintiff was indebted to A. Blackburn in the amount of the said note. That defendant, in right of his wife, had and received all the benefit and advantage arising from the said services and expenditure. That thereupon in consideration of the premises defendant promised plaintiff that he would pay and discharge the amount of the said promissory note; but that, although a reasonable time for paying and discharging the said note had elapsed and A. Blackburn, the holder thereof, was always willing to accept payment from defendant, and defendant was requested by plaintiff to pay and discharge the amount thereof, defendant did not, nor would then, or at any other time pay or discharge the amount, &c., but wholly refused, &c.

Plea: non assumpsit.

On the trial before Patteson J. at the York Spring Assizes 1838, it was objected on the part of the defendant that the promise stated in the declaration, and proved, was a promise to pay the debt of another within the Statute of Frauds, 29 Car. 2, c. 3, s. 4, and ought to have been in writing; on the other hand it was contended that such defence, if available at all, was not admissible under the plea of non assumpsit. The learned Judge was of the latter opinion, and the plaintiff had a verdict, subject to a motion to enter a verdict for the defendant.

Cresswell, in the following term, obtained a rule nisi according to the leave reserved, and also for arresting judgment on the ground that the declaration shewed no consideration for the promise alleged. In Trinity vacation, 1839,[1]

Alexander and W. H. Watson shewed cause.

Cresswell, contrà.

Cur. adv. vult.

The judgment of the Court was delivered by

LORD DENMAN, C.J.—The first point in this case arose on the fourth section of the Statute of Frauds, viz., whether the promise of the defendant was to 'answer for the debt, default, or

[1] June 19th. Before Lord Denman C.J., Patteson, Williams, and Coleridge Js.

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miscarriage of another person.' Upon the hearing we decided, in conformity with the case of *Buttemere* v. *Hayes* (5 Mee. & W. 456), that this defence might be set up under the plea of non assumpsit.

The facts were that the plaintiff was liable to a Mr. Blackburn on a promissory note; and the defendant, for a consideration, which may for the purpose of the argument be taken to have been sufficient, promised the plaintiff to pay and discharge the note to Blackburn. If the promise had been made to Blackburn, doubtless the statute would have applied: it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another, because the promise is made to that other, viz., the debtor, and not to the creditor, the statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration we are of opinion that the statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one.

The second point arose in arrest of judgment, namely, whether the declaration shewed a sufficient consideration for the promise. It stated, in effect, that the plaintiff was executor under the will of the father of the defendant's wife, who had died intestate as to his real estate leaving the defendant's wife, an infant, his only child; that the plaintiff had voluntarily expended his money for the improvement of the real estate, whilst the defendant's wife was sole and a minor; and that, to reimburse himself, he had borrowed money of Blackburn to whom he had given his promissory note; that the defendant's wife, while sole, had received the benefit, and, after she came of age, assented and promised to pay the note, and did pay a year's interest; that after the marriage the plaintiff's accounts were shewn to the defendant, who assented to them, and it appeared that there was due to the plaintiff a sum equal to the amount of the note to Blackburn; that the defendant in right of his wife had received all the benefit, and, in consideration of the premises, promised to pay and discharge the amount of the note to Blackburn.

Upon motion in arrest of judgment, this promise must be taken

to have been proved, and to have been an express promise, as indeed it must of necessity have been, for no such implied promise in law was ever heard of. It was then argued for the plaintiff that the declaration disclosed a sufficient moral consideration to support the promise.

Most of the older cases on this subject are collected in a learned note to the case of *Wennall* v. *Adney* (3 B. & P. 249), and the conclusion there arrived at seems to be correct in general, 'that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation, on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statute provision.' Instances are given of voidable contracts, as those of infants ratified by an express promise after age, and distinguished from void contracts, as of married women, not capable of ratification by them when widows; *Loyd* v. *Lee* (1 Stra. 94); debts of bankrupts revived by subsequent promise after certificate; and similar cases. Since that time some cases have occurred upon this subject, which require to be more particularly examined. *Barnes* v. *Hedley* (2 Taunt. 184), decided that a promise to repay a sum of money, with legal interest, which sum had originally been lent on usurious terms, but, in taking the account of which, all usurious items had been by agreement struck out, was binding. *Lee* v. *Muggeridge*,[1] upheld an assumpsit by a widow that her executors should pay a bond given by her while a feme covert to secure money then advanced to a third person at her request. On the latter occasion the language of Mansfield C.J. and of the whole Court of Common Pleas, is very large, and hardly susceptible of any limitation. It is conformable to the expressions used by the Judges of this Court in *Cooper* v. *Martin* (4 East, 76), where a stepfather was permitted to recover from the son of his wife, after he had attained his full age, upon a declaration for necessaries furnished to him while an infant, for which, after his full age, he promised to pay. It is remarkable that in none of these there was

[1] 5 Taunt. 36. On a previous suit in equity to declare the bond a charge on the separate estate of the testatrix, the Master of the Rolls had refused relief. S. C. 1 V. & B. 118.

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any allusion made to the learned note in 3 Bosanquet and Puller above referred to, and which has been very generally thought to contain a correct statement of the law. The case of *Barnes* v. *Hedley* (2 Taunt. 184), is fully consistent with the doctrine in that note laid down. *Cooper* v. *Martin* (4 East, 76), also, when fully examined, will be found not to be inconsistent with it. This last case appears to have occupied the attention of the Court much more in respect of the supposed statutable liability of a stepfather, which was denied by the Court, and in respect of what a Court of Equity would hold as to a stepfather's liability, and rather to have assumed the point before us. It should, however, be observed that Lord Ellenborough in giving his judgment says, 'The plaintiff having done an act beneficial for the defendant in his infancy, it is a good consideration for the defendant's promise after he came of age. In such a case the law will imply a request; and the fact of the promise has been found by the jury;' and undoubtedly the action would have lain against the defendant whilst an infant, inasmuch as it was for necessaries furnished at his request in regard to which the law raises an implied promise. The case of *Lee* v. *Muggeridge* (5 Taunt. 36), must however be allowed to be decidedly at variance with the doctrine in the note alluded to, and is a decision of great authority. It should however be observed that in that case there was an actual request of the defendant during coverture, though not one binding in law; but the ground of decision there taken was also equally applicable to *Littlefield* v. *Shee* (2 B. & Ad. 811), tried by Gaselee J. at N. P., when that learned Judge held, notwithstanding, that 'the defendant having been a married woman when the goods were supplied, her husband was originally liable, and there was no consideration for the promises declared upon.' After time taken for deliberation this Court refused even a rule to shew cause why the nonsuit should not be set aside. *Lee* v. *Muggeridge* (5 Taunt. 36), was cited on the motion, and was sought to be distinguished by Lord Tenterden, because there the circumstances raising the consideration were set out truly upon the record, but in *Littlefield* v. *Shee* the declaration stated the consideration to be that the plaintiff had supplied the defendant with goods at her request, which the plaintiff failed in proving, inasmuch as it appeared that the goods were in point of law supplied to the defendant's husband, and not to her. But Lord Tenterden added, that the doctrine

that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation. This sentence, in truth, amounts to a dissent from the authority of *Lee* v. *Muggeridge* (5 Taunt. 36), where the doctrine is wholly unqualified.

The eminent counsel who argued for the plaintiff in *Lee* v. *Muggeridge* (5 Taunt. 36), spoke of Lord Mansfield as having considered the rule of nudum pactum as too narrow, and maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down. If the latter, the note to *Wennall* v. *Adney* (3 B. & P. 249), shews the deduction to be erroneous. If the former, Lord Tenterden and this Court declared that they could not adopt it in *Littlefield* v. *Shee* (2 B. & Ad. 811). Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.

The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.

Taking then the promise of the defendant, as stated on this record, to have been an express promise, we find that the consideration for it was past and executed long before, and yet it is not laid to have been at the request of the defendant, nor even of his wife while sole (though if it had, the case of *Mitchinson* v. *Hewson* (7 T. R. 348), shews that it would not have been sufficient), and the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money.

If the subsequent assent of the defendant could have amounted to a ratihabitio, the declaration should have stated the money to have been expended at his request, and the ratification should have been relied on as matter of evidence; but this was obviously

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impossible, because the defendant was in no way connected with the property or with the plaintiff, when the money was expended. If the ratification of the wife while sole were relied on, then a debt from her would have been shewn, and the defendant could not have been charged in his own right without some further consideration, as of forbearance after marriage, or something of that sort ; and then another point would have arisen upon the Statute of Frauds which did not arise as it was, but which might in that case have been available under the plea of non assumpsit.

In holding this declaration bad because it states no consideration but a past benefit not conferred at the request of the defendant, we conceive that we are justified by the old common law of England.

Lampleigh v. *Brathwait* (Hob. 105), is selected by Mr. Smith (1 Smith's Leading Cases, 67), as the leading case on this subject, which was there fully discussed, though not necessary to the decision. Hobart C.J. lays it down that 'a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind ; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit ; which is the difference' ; a difference brought fully out by *Hunt* v. *Bate* (Dyer, 272 (*a*)), there cited from Dyer, where a promise to indemnify the plaintiff against the consequences of having bailed the defendant's servant, which the plaintiff had done without request of the defendant, was held to be made without consideration ; but a promise to pay 20*l.* to plaintiff, who had married defendant's cousin, but at defendant's special instance, was held binding.

The distinction is noted, and was acted upon, in *Townsend* v. *Hunt* (Cro. Car. 408), and indeed in numerous old books ; while the principle of moral obligation does not make its appearance till the days of Lord Mansfield, and then under circumstances not inconsistent with this ancient doctrine when properly explained.

Upon the whole, we are of opinion that the rule must be made absolute to arrest the judgment.

Rule to enter verdict for defendant, discharged.
Rule to arrest judgment, absolute.

'It seems to me that if an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise you would have to try the whole cause to know if the man had a right to compromise it, and with regard to questions of law it is obvious you could never safely compromise a question of law at all.'—Per Bowen, L.J., in *Miles* v. *New Zealand Alford Estate Co.* (1886) 32 Ch. D. at p. 291.

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Declaration, that the plaintiff had alleged that certain moneys were due and owing to him, to wit, from the Government of Honduras, and from Don Carlos Gattierez, and others, and had threatened and was about to take legal proceedings against the said government and persons to enforce payment of the same; and thereupon, in consideration that the plaintiff would forbear from taking such proceedings for an agreed time, the defendant promised to deliver to the plaintiff certain securities, to wit, bonds or debentures, called Honduras Railway Loan Bonds, for sums to the amount of 600*l.*, immediately the bonds should be printed. Averment, that the plaintiff did not take any proceedings during the agreed period, or at all; and that all conditions had been fulfilled necessary to entitle him to sue in respect of the matters before stated. Breach, that the defendant had not delivered to the plaintiff the bonds, or any of them.

Plea, that at the time of making the alleged agreement no moneys were due and owing to the plaintiff from the government and other persons.

Demurrer and joinder.

COCKBURN, C.J.—Our judgment must be for the plaintiff. No doubt it must be taken that there was, in fact, no claim by the plaintiff against the Honduras Government which could be prosecuted by legal proceedings to a successful issue; but this

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does not vitiate the contract and destroy the validity of what is alleged as the consideration. The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it. The defendant's contention is unsupported by authority.

It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it: in that case his conduct would be fraudulent. If the plea had alleged that the plaintiff knew he had no real claim against the Honduras Government, that would have been an answer to the action.

BLACKBURN, J.—I am of the same opinion. The declaration, as it stands, in effect states that the plaintiff, having alleged that certain moneys were due to him from the Honduras Government, was about to enforce payment, and the defendant suggested that the plaintiff's claim, whether good or bad, should stand over. So far, the agreement was a reasonable one. The plea, however, alleges that at the time of making the agreement no money was due. If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding, and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated. This case is decided by *Cook* v. *Wright* (1 B. & S. 559, 570; 30 L. J. (Q. B.) 321, 324). In that case it appeared from the evidence that the defendant knew that the original claim of the plaintiff was invalid, yet he was held liable,

as the plaintiff believed his claim to be good. The Court say (1 B. & S. at p. 570; 30 L. J. (Q. B.) at p. 324) that 'the real consideration depends on the reality of the claim made, and the bona fides of the compromise.' If the plaintiff's claim against the Honduras Government was not bonâ fide, this ought to have been alleged in the plea; but no such allegation appears.

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MELLOR, J.—I am of the same opinion. If the plaintiff's claim against the Honduras Government was fraudulent, the defendant ought to have alleged it.

LUSH, J., concurred.

Judgment for the plaintiff.

'The mere existence of a debt is not good consideration in itself.'—Per Vaughan Williams, L.J., in *Glegg* v. *Bromley* [1912] 3 K. B. at p. 479.[1]

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On December 18, 1902, William Henry Hackblock effected a policy on his own life with the English and Scottish Law Life Assurance Association for 5000*l.*, subject to conditions printed on the policy, of which No. 6 contained the following provision: 'Policies will also be void and all premiums forfeited if the lives assured die by their own hands, or by duelling, or by the hands of justice, but without prejudice to the bona fide interests of third parties based on valuable consideration.'

In August, 1906, Hackblock was being pressed by Sir Frederick Wigan for payment or reduction of a debt of 15,000*l.* and upwards, and on August 30, 1906, Hackblock wrote to his solicitors, in a letter enclosing the policy, 'I enclose a 5000*l.* policy Get it assigned to Wigan or to yourselves Please get this done at once When I pay off I can get it re-assigned to me. . . . Wigan need not know of the policy till it is repaid.' Hackblock's solicitors, on receipt of this letter, prepared and sent him for execution a

[1] 'Note that bills of exchange and promissory notes are an exception to this rule. Cf. Bills of Exchange Act, 1882, § 27 (1) 'Valuable consideration for a bill may be constituted by,—
(*a*) Any consideration sufficient to support a simple contract;
(*b*) An antecedent debt or liability.' [Edd.]

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deed expressed to be made between himself, therein called the mortgagor, and Sir Frederick Wigan, therein called the mortgagee, by which, after a recital that the mortgagor was indebted to the mortgagee in sums amounting to upwards of 15,000*l.* and that the mortgagee had asked for further security, the policy was assigned to the mortgagee with a proviso for redemption on payment of all moneys due from the mortgagor to the mortgagee with interest. It was not true that Sir Frederick Wigan had asked for further security, but he or his firm had pressed for reduction of the debt.

Hackblock duly executed this mortgage and sent it to his solicitors with a letter, leaving it entirely to them to decide whether they should tell Sir Frederick Wigan of the deed or not. The solicitors negotiated an arrangement with Sir Frederick Wigan's firm for giving Hackblock time, without producing the assignment of the policy, and they shortly afterwards, at Hackblock's request, destroyed the assignment. No notice of the assignment was given to the insurance society or to Sir Frederick Wigan or his firm during Hackblock's life.

Hackblock died by his own hand on September 19, 1906.

Sir Frederick Wigan died on April 6, 1907, having made a will appointing the plaintiffs his executors, and they had obtained probate.

Hackblock's estate was being administered in the Chancery Division. Sir Frederick Wigan's firm had brought in a claim, and the facts as to the assignment having come to the knowledge of the Master, he caused the plaintiffs to be informed of them. The plaintiffs then gave notice to the assurance association of the assignment and brought this action against them for payment of the moneys insured.

PARKER, J.—In this action the plaintiffs, who are the executors of the late Sir Frederick Wigan, sue on a policy of insurance on the life of the late Mr. William Henry Hackblock, of which they claim to be the assignees.

The policy contains a provision to this effect: 'Policies will also be void'—which, of course, includes this policy—'and all premiums forfeited, if the lives assured die by their own hands, or by duelling, or by the hands of justice, but without prejudice

to the bona fide interests of third parties based on valuable consideration.' It is admitted in this case that the insured, William Henry Hackblock, did die by his own hand, and, therefore, if the plaintiffs are to succeed in suing on the policy as a valid policy, they must bring themselves within the clause 'without prejudice to the bona fide interests of third parties based on valuable consideration.' In my opinion it is reasonably clear what that clause means, and I do not think that any particular point can be made as to the words which are actually used. The intention is that a person who is to be saved by the saving clause must be a person who is a purchaser of the interest he claims for value and has acquired that interest bona fide.

The question is, therefore, first, whether the plaintiffs are assigns of the policy as they claim to be; and, secondly, whether, if they are assigns of the policy, the interest they claim under the assignment is an interest which they acquired bona fide for valuable consideration.

The facts of the case are quite short. It appears that the insured had the misfortune to kill his wife by an accident, and on the day of her funeral he was evidently worrying as to various financial matters, and, among other things, as to a large sum of money which he owed Sir Frederick Wigan, a sum amounting to at least 15,000*l.*, and, as I gather, possibly a further sum of a considerable amount. He had given Sir Frederick Wigan some security, though it does not appear exactly what security, for that debt. On August 30, 1906, the day of his wife's funeral, he wrote to his solicitors, in effect telling them to prepare an assignment of this policy of insurance, which he enclosed in the letter, to Sir Frederick Wigan, or to themselves in trust for Sir Frederick Wigan, to secure Sir Frederick Wigan's debt. I think it is quite clear that that letter was received by Mr. Lightly, a member of the firm who were then acting for the insured, and that he on those instructions did prepare a draft assignment. The draft assignment was identified by him and I have it in my hands. It was originally dictated to a shorthand clerk, who copied it out, and Mr. Lightly revised it in his own handwriting. It purports to be the draft of an indenture executed between the insured, William Henry Hackblock, therein called the mortgagor, and Sir Frederick William Wigan, therein called the mortgagee,

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It contains a recital that 'the mortgagor is indebted to the mortgagee in sums amounting to upwards of 15,000*l*., and the mortgagee has requested the mortgagor to give to him further security for the repayment thereof.' That recital is not true. There had been no question as to further security, though possibly there had been some question as to payment of the debt. Then it is witnessed 'That in pursuance of the said agreement and in consideration of the premises, the mortgagor, as beneficial owner,' conveys the policy to the mortgagee, subject to a proviso for redemption on payment of the moneys to the mortgagee. That document having been prepared was engrossed, and the engrossment was forwarded on August 31, 1906, to the insured, William Henry Hackblock. He returned it executed and attested in a letter of September 1, and I see no reason to doubt that the engrossment so forwarded to him was actually executed by him in the usual way. A question may arise as to whether it was executed upon some condition which may or may not have taken effect, but that question I postpone for the present.

The solicitors, having got this assignment to Sir Frederick Wigan in their possession, entered into negotiation with Sir Frederick Wigan's firm with a view to obtaining further time for the payment of the money which was due to Sir Frederick Wigan or his firm from the insured, and the gentleman who attended to the matter had the assignment in his pocket, at the time of the negotiation, to be used if it were necessary. It was not necessary, and it was not used, and it remained for some days afterwards in the hands of the solicitors for the insured, and on September 13 the gentleman who had charge of the matter destroyed the document upon the express instructions of the insured, and he entered a note on the back of the draft to the effect that the original had been so destroyed by the instructions of the insured, and nothing further was done in the matter.

The insured some days afterwards died by his own hand, and his estate, as I understand it, is being administered in this Division of the Court. In the process of that administration Sir Frederick Wigan's firm put in a proof, and in the course of investigating the claims of creditors the facts which I have just detailed came to the notice of the Master, and he directed that notice of them should be given to the firm. Notice of these facts was accord-

ingly given, and the plaintiffs the executors of Sir Frederick Wigan claim to be assignees of the policy under this deed which was destroyed, and of which they subsequently gave notice to the insurance society.

Two points arise. The first is whether this document was executed and delivered as a deed to be binding, or whether it was executed and delivered upon a condition which would make it an escrow, in which case it would not operate until that condition was fulfilled. The second question is whether under the circumstances Sir Frederick Wigan, the mortgagee, can be said to have acquired his interest under the deed, if it did operate, bona fide for valuable consideration within the meaning of the clause in the policy to which I have referred. It is admitted by all parties that no communication was made to Sir Frederick Wigan or to any one on his behalf of the contents of the document until after the death of Mr. Hackblock and until in the course of the administration of the estate the Master directed that the facts which had come to his knowledge should be communicated.

Dealing first with the second question, I am of opinion that there is no possible ground for maintaining under the circumstances to which I have referred that Sir Frederick Wigan, the mortgagee, gave any consideration at all for the interest which he had acquired, if he did acquire any interest, under the deed in question. It appears to me to be reasonably clear that the mere existence of a debt from A. to B. is not sufficient valuable consideration for the giving of a security from A. to B. to secure that debt. If such a security is given, it may of course be given upon some express agreement to give time for the payment of the debt, or to give consideration for the security in some other way, or, if there be no express agreement, the law may very readily imply an agreement to give time. It may not be a definite time, but to forbear for some indefinite time in consideration of the security being given. And further than that, if there is no express agreement, and no agreement can be implied at the time and under the circumstances at and under which the indenture giving the further security is executed, yet if that security be communicated to a person who could otherwise sue on the debt, and on the strength of that security he does in fact forbear to sue on the debt, he does give that time with the object of securing which the

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security is presumably given, and then I think it appears on the cases that there is sufficient consideration, though in a sense it is an ex post facto consideration, for the security which is given.

On the other hand, it appears to me that where there is no communication of the security, where there is no express agreement, and there are no circumstances from which the Courts can imply any agreement, then there is no possibility of its being said with any justice that any consideration has been given at all.

That that is the state of the law upon this particular point is, I think, reasonably clear from the authorities which have been quoted to me in argument, beginning with the case of *Alliance Bank* v. *Broom* (2 Dr. & Sm. 289). In that case a customer had been called on by his bankers to give security for money due from him on a loan account, and had agreed by letter to give security. A bill which had been filed to enforce such agreement was demurred to on the ground that the agreement to give the security was without consideration. It was held in that case that the forbearance of the bank to enforce payment of the existing debt in consequence of the agreement was a sufficient consideration to support it, and the demurrer was overruled.

Now that case would have been wholly unnecessary and the arguments would have been wholly improper if the mere existence of the debt without any forbearance to sue was a sufficient consideration for the security which had been agreed to be given. Kindersley V.-C. says (2 Dr. & Sm. 292): 'It appears to me, that when the plaintiffs demanded payment of their debt, and, in consequence of that application, the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did, in effect, give, and the defendant received, the benefit of some degree of forbearance; not, indeed, for any definite time, but, at all events, some extent of forbearance. If, on the application for security being made, the defendant had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt, and have taken steps to enforce it. It is very true that, at any time after the promise, the creditor might have insisted on payment of his debt, and have brought

an action ; but the circumstances necessarily involve the benefit to the debtor of a certain amount of forbearance, which he would not have derived if he had not made the agreement.' And that judgment of Kindersley V.-C. was approved by the House of Lords in the case of *Fullerton* v. *Provincial Bank of Ireland* ([1903] A. C. 309, 313). There Lord Macnaghten, on the point which had been raised, says it was settled by authority. ' In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it.'. And the other Lords used language very much to the same effect.

There is also a case of *Cracknall* v. *Janson* (11 Ch. D. 1), in which Mr. Justice (afterwards Lord Justice) Fry deals with the law upon the subject in the same way. Lastly, there is the case of *In re Barker's Estate* (44 L. J. (Ch.) 487), in which Sir George Jessel also deals with the subject. In that case the circumstances were to a considerable extent analogous to the circumstances in this case, and therefore I will deal with it in somewhat greater detail than I have done with the other cases. A solicitor had mortgaged an estate to the trustee of his marriage settlement, and, notwithstanding that, he fraudulently deposited the title deeds with another creditor of his own, fraudulently because the title deeds were in his possession as solicitor for the mortgagees, and he had no business or right to deal with them. Then in 1860 he mortgaged certain other lands which belonged to himself by way of demise, in order to secure the persons wronged from injury by reason of his having disposed of the title deeds of the estate which had been mortgaged. There was no consideration stated in the deed, and he retained the deed without making any communication at all to the persons in whose favour it was executed. The decision of Sir George Jessel was that that deed, not having been communicated, and there having been no forbearance, was an entirely voluntary deed, and, being a voluntary deed, was void as against a subsequent purchaser for value.

Sir George Jessel says this (44 L. J. (Ch.) 489, 490): ' This being so, if the deed of the 24th of November, 1860, be voluntary,

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the statute of the 27th of Elizabeth avoids it by relation, the doctrine being that, however honest, as this was—for, in truth, it was an attempt to repair the consequences of a dishonest act by the person who had committed it—yet, in contemplation of law, the person who has executed the voluntary deed, and at any time after, conveys away the estate, although he gives notice to the purchaser of the voluntary deed, is presumed to have had in his mind, at the time of executing the voluntary deed, a fraudulent intent, that is, an intent to cheat the purchaser who bought the estate afterwards, with notice of the voluntary deed, and of the whole of the transaction. That is the law, and I must follow it. Consequently, as there is no consideration, the deed is a void deed.' Then he proceeds to deal with the question of constructive notice as to whether there had been notice of the deed given to the person in whose favour it had been executed. Then he proceeds —and this is perhaps the most material part of the judgment— on the supposition that the person in whose favour the deed had been executed had had constructive notice, to state what would have happened. He says: 'But supposing he had, it would not carry the case a bit further. You cannot have consideration without either contract in the first instance, or such notice on the part of the person benefited by the voluntary instrument after knowledge of it, as changes his position. That is, in fact, contract also, but implied contract. If you have express contract, cadit quæstio, and there is nothing to argue. In the case of further security, the lender gives time and forbearance, or he gives some other advantage to the person giving the further security, and that is valuable consideration. But if, without that, after the voluntary instrument has been executed, its contents are communicated to the person taking the benefit of it, and acting upon the faith of it he does substantially alter his position, that is, he does communicate to the donor his acceptance of the further security, and by so doing he gives value to the donor, being the value which the donor expected him to give, he has, in fact, accepted the voluntary instrument as a consideration for the action he takes upon the faith of it. In that way it comes back again really to contract, and upon that ground it is that the Courts have refused to disturb voluntary deeds where consideration has been given for them, so to say, ex post facto. But where the

lender has no knowledge, it is impossible that he can give consideration in that way, and therefore I hold that mere constructive notice would not be sufficient.'

Now it appears to me that that is a clear decision that, where a deed giving further security is executed, but the person executing it holds it back and does not communicate it in any way to the person in whose favour it is executed, there being no express agreement to give further time or to forbear to sue, there being no circumstances upon which such an agreement can be implied, and the fact that no notice was given being absolutely inconsistent with any such ex post facto consideration as is mentioned by Sir George Jessel, in such a case the deed is purely voluntary, and would be held so by the Courts.

If that is a true statement of the law, it appears to me that in this case there is nothing which can be seized upon as valuable consideration for the interest which the plaintiffs have acquired, if they have acquired an interest, in this policy. It is true that various cases were called to my attention which were said to be inconsistent with the law as laid down in the cases I have already mentioned. One of those cases was *Middleton* v. *Pollock* (2 Ch. D. 104). In that case the Master of the Rolls, again Sir George Jessel, came to the conclusion that there had been what he refers to as good consideration, and what, no doubt, is really a valuable consideration, for the purposes of the question he was considering, which arose under the statute of 13 Eliz. c. 5. I am not quite sure that I entirely understand the case, because it will be remembered that the statute of Elizabeth avoids all conveyances and transfers of property which are made with the intent to defraud and delay creditors, but it contains a proviso saving any transfer or conveyance made bona fide for good consideration to a person having no notice of the fraudulent intent. I am not entirely satisfied whether the Master of the Rolls in his judgment is dealing with the question whether there was a fraudulent intent, or whether he is dealing with the question whether, admitting there was a fraudulent intent, the persons claiming were within the protective proviso. But of this I am certain, that on the particular circumstances of the case, which I need not go into, Sir George Jessel did come to the conclusion that there was good consideration, and, that being so, he practically held that the

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case was not the same sort of case as *In re Barker's Estate* (44 L.J. (Ch.) 487), which he had shortly before decided.

I had also my attention called to another case ([1894] 3 Ch. 678, 688) where Vaughan Williams J. used some expression with regard to consideration from which I was asked to infer that in his opinion the mere existence of a debt was sufficient consideration for a security without any actual forbearance or promise to forbear. I do not so read the remarks of the learned judge, and as he held in that case there was good consideration, in a variation of the terms on which the loan was made, namely, a reduction of interest from 6 to 5 per cent., it can only amount to a dictum, and I do not think it is a dictum I ought to follow in face of all the other authorities which appear to go in the other direction.

It was also said that if I examined the case of *New, Prance, and Garrard's Trustee* v. *Hunting* ([1897] 2 Q. B. 19), reported also in the House of Lords under the name of *Sharp* v. *Jackson* ([1899] A. C. 419), I should find that it must have been assumed throughout that case that a security given by deed, but not communicated, was given for valuable consideration, the valuable consideration consisting of an antecedent debt. As a matter of fact, I find no such thing in the case itself.[1] The case itself turns entirely upon what is or what is not fraudulent preference for the purposes of the administration of the law in bankruptcy. But I am asked to infer that the judges in the case must have thought that an antecedent debt was good consideration for a further security, because it is said that, if they had not done so, the particular security which was in question in the case would have been voluntary, and therefore bad in bankruptcy under a totally different section of the Act. I do not know how that may be, but I do not think that any inference can be drawn from a case of that sort which would justify me in treating it as a decision of law on a matter with which the judges were evidently not intending to deal in the slightest degree.

It seems to me, therefore, that there is no authority against, and a great many authorities in favour of, the proposition that in order to have a consideration for a further security there must be an agreement, express or implied, to give time or some further

[1] What does appear is that any objection founded on the deed having been voluntary was expressly waived by counsel.

consideration, or else there must be an actual forbearance which ex post facto may become the consideration to support the deed. None of those things exist in this case ; therefore I am bound to hold that the deed was purely voluntary, and that the interest which was acquired under it, if they did acquire any interest under it, by the persons in whose favour it was executed was not an interest acquired for value.

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That being the case, I do not think it is really necessary for me to give a decision on the other point, namely, whether the deed itself was executed upon a condition which was not fulfilled and is merely an escrow, or whether it was executed unconditionally to take effect in any event. I do not intend to go into those questions, because I am satisfied that in any event, even if I treat the deed as having been delivered unconditionally, the plaintiffs are not assigns for value within the meaning of the exception contained in the policy, and therefore the policy is, as between the insurance society and them, void under the condition. Under the circumstances, therefore, this action must be dismissed with costs.

' The owner may use and dispose of ordinary goods as he thinks fit. He may have made a certain contract with the person from whom he bought, and to such a contract he must answer. Simply, however, in his capacity as owner, he is not bound by any restrictions in regard to the use or sale of the goods, and it is out of the question to suggest that restrictive conditions run with the goods.'—Per Lord Shaw in *National Phonograph Company of Australia, Limited*, v. *Menck* [1911] A. C. at p. 347. But ' a purchaser who buys a patented article with knowledge of the conditions under which his vendor is authorized to use the patented invention, is bound by such conditions, and such conditions are not contractual, but are incident to and a limitation of the grant of the licence to use, so that if the conditions are broken there is no grant at all.'—Ibid. at p. 352, citing Farwell, J., in *British Mutoscope and Biograph Co.* v. *Homer* [1901] 1 Ch. 671.

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McGRUTHER *v.* PITCHER [1904] 2 Ch. 306

Appeal from a decision of Farwell J.

The plaintiffs were rubber manufacturers at Preston ; the defendant was a boot and shoe retailer at Brixton.

By their statement of claim the plaintiffs alleged that they were the sole manufacturers of the ' Palatine Revolving Rubber

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Heel Pad' under a licence from a Mr. Roberts, who was the owner of the Wood-Milne Patent for the article, and they alleged that their revolving heel pads were well known in the trade and had a very extensive sale.

The statement of claim contained the following paragraphs :—

'(4.) The plaintiffs sell and dispose of their said revolving heel pads on the following conditions of sale, viz. :—

'"These revolving heel pads, whether bought directly from us or from any dealer, are sold on the express agreement that the same shall not be retailed at less than the following prices, viz. :—

'"Ladies' 10*d.* per pair.

'"Gent's 1*s.* per pair.

And shall not be resold except subject to these conditions as a term of sale.

'"The acceptance of the goods by any purchaser will be deemed to be an acknowledgment that they are sold to him on these conditions and on these conditions only, and that he agrees with the vendors (as our agents in this respect) to be bound by the same.

'"These revolving heel pads are supplied to a dealer on the above express agreement, and also on the additional terms that these conditions shall remain attached to every package sold wholesale, and shall form part of the terms upon which every such dealer resells every such package."

'(5.) The plaintiffs' course of business in the sale and disposal of their said revolving heel pads has always been and is still to pack them in boxes, and on the inside of the lid of each box are printed in large type the said conditions of sale upon which the said revolving heel pads are sold.

'(6.) The plaintiffs dispose of considerable quantities of these said revolving heel pads to factors in London and elsewhere for resale by them. All of such revolving heel pads are packed in boxes with the said conditions of sale printed as aforesaid.'

The plaintiffs alleged that the defendant had purchased from Charles Howes, one of their factors, some of their revolving heel pads, and that when he made the purchase he was orally informed by Howes of the conditions upon which the pads were sold to him and accepted by him.

Notwithstanding this the defendant had sold the pads at prices less than those mentioned in the conditions, and he threatened and intended to continue so doing.

The plaintiffs claimed an injunction to restrain the defendant from selling rubber heel pads manufactured by the plaintiffs, and purchased by him either directly or indirectly, at less prices than those mentioned in the conditions.

The defendant did not deny that he had sold a few of the plaintiffs' pads at prices lower than those mentioned in the conditions, but he said that when he made the purchase he was not informed by Howe of the conditions and had no notice of them. He did not admit that the conditions were binding on him or that he ever entered into any contract with the plaintiffs regulating the price at which he might sell the pads. And 'the defendant will also contend that the said alleged conditions are illegal and void as being in restraint of trade.'

At the trial of the action Farwell J. granted an injunction as claimed by the plaintiffs, but limited its duration to the period of the continuance of the patent.

The defendant appealed.

Vaughan Williams, L.J.—In my judgment this is both in substance and in form an action for breach of contract. So treating it, I suppose no one will deny the authority of *Price* v. *Easton* ((1833) 4 B. & Ad. 433), in which it was decided that 'an action for breach of contract must be brought by the person from whom the consideration moved'; and that is confirmed by *Tweddle* v. *Atkinson* ((1861) 1 B. & S. 393).

Now Mr. McCall very properly and frankly admitted that if an action were brought for the price of these heel pads it could only be brought by Howes. But he said that the plaintiffs, who are licensees from Roberts, the owner of the patent, are entitled to sue for the breach of contract. I cannot assent to that proposition. It is said that the defendant may be sued for breach of the condition as to the prices at which the pads are to be sold. Why? Because it is said the defendant bought with notice of that condition. Even if the defendant did buy with notice of the condition, I entirely deny that this would give any rights to a person who was not a party to the bargain.

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An attempt of this sort was made in *Taddy & Co.* v. *Sterious & Co.* ([1904] 1 Ch. 354). The head-note of that case is as follows: ' T. & Co., manufacturers of tobacco, sold packet tobaccos subject to printed terms and conditions fixing a minimum price below which they were not to be sold, and containing the following proviso: " Acceptance of the goods will be deemed a contract between the purchaser and T. & Co. that he will observe the stipulations." ' (A much stronger case, be it observed, than the present.) ' " In the case of a purchase by a retail dealer through a wholesale dealer, the latter shall be deemed to be the agent of T. & Co." T. & Co. sold to N., who resold for his own profit to S. & Co. S. & Co. had notice of the conditions, but sold to the public at a price below the stipulated minimum:—*Held*, that there was no contract between T. & Co. and S. & Co. which T. & Co. could enforce, and that conditions cannot be attached to goods so as to bind all purchasers with notice.' One need only look at paragraph 5 of the statement of claim in the present case to see that the pleader meant to affirm just the contrary to the decision of Swinfen Eady J. in *Taddy & Co.* v. *Sterious & Co.* ([1904] 1 Ch. 358). That paragraph contains really the gist of this action. [His Lordship read paragraph 5, and continued:—]

The plaintiffs say that because the defendant had notice of these conditions, although he entered into no contract whatsoever directly or indirectly with the plaintiffs, they can sue him for the breach of the conditions. I do not agree, and I think that the decision of Swinfen Eady J. was perfectly right. He said ([1904] 1 Ch. 358): ' Secondly, they contended that the goods were sold subject to certain conditions, and that, even if Netten or any one else had purported to sell them free from the conditions, Sterious & Co., having notice of the conditions, could not sell goods except according to the conditions, and the plaintiffs were entitled to restrain them from doing so. With regard to this last contention, there is a short answer. Conditions of this kind do not run with the goods, and cannot be imposed upon them. Subsequent purchasers, therefore, do not take subject to any conditions which the Court can enforce. If there was a breach of contract, the plaintiffs could no doubt sue. The question remains, therefore, whether there was any contract. There was no direct contract between Sterious & Co. and Taddy

& Co., and the question does not arise as to the effect of a sale by Taddy & Co. direct to a retail trader subject to these terms as to minimum retail price.' In my opinion that is perfectly sound, and I think the present plaintiffs have no cause of action. I desire to add that the case does not appear to have been presented to Farwell J. in the way in which it has been presented to us. Farwell J. seems to have dealt with the action as if it were brought to enforce the rights of the patentee through his licensees. I say nothing as to those rights, because in my judgment this is simply an action for breach of contract, and the plaintiffs were not parties to the contract.

Romer, L.J.—I have arrived at the same conclusion.

I have tried in vain to see on what ground this case could be successfully based by the plaintiffs, and I am bound to say that I cannot find any secure ground.

In the first place, this case is not one in which the plaintiffs can be fairly regarded as seeking to enforce some patent rights which are vested in them. I can find no trace of such a case. The plaintiffs certainly say that the article is patented, but they state that they are mere licensees to manufacture it, and, as I gather also, to sell it. They do not say that as licensees they cannot do that; and if they could, so far as I can see, the person who would have a right to complain would be the patentee. The plaintiffs do not say that any of the rights of the patentee are vested in them beyond what they have as licensees. At any rate I cannot find any case established which would justify the Court in giving the plaintiffs relief on the footing of patent rights. That being so, they must succeed if at all on some other ground.

Can the plaintiffs succeed on the ground that they are selling goods, and that they purported to attach a condition to the resale of the goods, and that the defendant was informed of this condition when he purchased the goods? Clearly, to my mind, they cannot. A vendor cannot in that way enforce a condition on the sale of his goods out and out, and, by printing the so-called condition upon some part of the goods or on the case containing them, say that every subsequent purchaser of the goods is bound to comply with the condition, so that if he

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does not comply with the condition he can be sued by the original vendor. That is clearly wrong. You cannot in that way make conditions run with goods.

The only other possible ground for the action is contract. Have the plaintiffs succeeded in shewing that they have entered into a contract with the defendant? The evidence utterly fails to prove any such contract. On the contrary, so far as I can see, the defendant has throughout said that he always intended to sell the pads without regard to the conditions, and I certainly cannot find any evidence that he agreed with his vendor to comply with the conditions. And even if the defendant had so contracted with his vendor, I should have a difficulty in holding that that would constitute a contract between the defendant and the plaintiffs. Even if the intermediate vendor was the agent of the plaintiffs, I doubt very much whether the plaintiffs could maintain the action; but I need not consider that case. In fact, I cannot find any intermediate contract between the defendant and his vendor.

That being so, the ground of contract fails, and, as I have already said, I can find no sure ground on which to rest the plaintiffs' case. In my opinion the action fails, and the appeal must be allowed.

Cozens-Hardy, L.J.—I am of the same opinion. On the evidence it is plain that there was no direct contract between the plaintiffs and the defendant when he purchased these goods. He purchased the goods, not from the plaintiffs, but from Howes. The defendant and Howes were the only parties to that contract of sale. If there has been any breach of the terms of that contract Howes is the only person who can sue in respect of it, and, as it seems to me, it is in no way relevant to say that Howes, when he bought the goods from the plaintiffs, bought them subject to a condition, of which the defendant had notice when he bought the goods from Howes. On that point I have nothing to add to what Swinfen Eady J. said in *Taddy & Co.* v. *Sterious & Co.* ([1904] 1 Ch. 354).

I cannot help thinking that in the argument in the Court below some confusion was introduced by reference to patent rights. Now this action is neither in form nor in fact an action

by a patentee claiming an injunction to restrain an infringement of his patent. In such an action it is open to the defendant to plead a licence by the plaintiff. That licence may be express, or it may be implied from the sale by the patentee of the patented article, but, if the defendant pleads a licence, then it is competent for the plaintiff to reply, 'The licence which I granted is a limited licence, and you, the person who has now got the patented article, were aware it was only a limited licence, and you cannot therefore defend yourself against my claim for an infringement of my patent, because you are going outside the licence which to your knowledge I gave with reference to this article.' Such a case would not depend upon any condition running with or attaching to the article. It would depend only upon the limits of the licence which the patentee had granted when he first parted with the goods.

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For these reasons I think the judgment of Farwell J. cannot be supported, and the appeal must be allowed with costs.

'If A has refused or hesitated to perform an agreement with B, and is requested to do so by C, who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A thereupon undertakes to do it, the performance by A of his agreement in consequence of such request and promise by C is a good consideration to support C's promise.'—Per Allen, J., in *Abbott* v. *Doane* (1895) 163 Mass. at p. 436.

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SCOTSON *v.* PEGG (1861) 6 H. & N. 295

Declaration. For that in consideration that the plaintiffs, at the request of the defendant, would deliver to the defendant a certain cargo of coals, then on board a certain ship of the plaintiffs the defendant to take the same from and out of the said ship, the defendant promised the plaintiffs to unload and discharge the same at the rate of forty-nine tons of the said coals during each working day, after the said ship was ready to unload and discharge the same. And although the plaintiffs did afterwards deliver the said cargo to the defendant, and were always ready and willing to suffer and permit him to take the same from and out of the said ship aforesaid, and although all things were done, and conditions precedent to be performed by the plaintiffs were performed by the plaintiffs, to entitle the plaintiffs to a performance

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of the said promise by the defendant: Yet the defendant did not unload and discharge the said cargo at the rate aforesaid during each working day after the said ship was ready to unload and discharge the same, and the defendant wholly neglected and refused so to do for five days longer and more than he ought to have done according to his said promise; and the plaintiffs were put to expense in and about the maintaining and keeping the master and crew of the said ship &c.

Plea. That before the making of the said promise the plaintiffs, by another contract made by and between the plaintiffs and certain other persons, agreed with the said certain other persons, for certain freight therefore payable by the said other persons to the plaintiffs, to carry the said coals on a certain voyage in the said ship, and to deliver the said coals to the order of the said other persons, which contract was in full force thence, until and at the time of the making of the said promise and the delivery of the said coals. And the defendant says that before the making of the said promise, and after the making the said other contract, and while the last mentioned contract was in force, he bought the coals of the said other persons, who thereupon ordered the plaintiffs to deliver the same to the defendant, under and according to the said contract with the said other persons, of which the plaintiffs, before the making of the said promise, had notice. And the defendant says that the said order was in full force until and at the time of the making of the said promise, and thence until and at the delivery of the said coals, of which the plaintiffs always had notice. And the defendant says the then future delivery to the defendant of the said coals on the terms in the declaration mentioned, which was the consideration for the said promise, was the delivery of the said coals to the order of the said other persons, which the plaintiffs had by the said contract with such other persons so agreed to make as aforesaid, and which before and at the time of the making of the said promise, until and at the time of the said delivery, the plaintiffs were, by, under and according to the said contract with the said other persons, bound to make as aforesaid. And the defendant says that there never was any consideration for his said promise other than the doing of that which by the said contract with the said other persons they the plaintiffs, before and at the time of

the making of the said promise, and thence until the plaintiffs did it, were bound to do.

Demurrer and joinder therein.

Dowdeswell, in support of the demurrer. The plea is bad. It admits a promise by the defendant to unload the coal at the rate of forty-nine tons a day; and the delivery of the same by the plaintiffs is a sufficient consideration to support the promise. The defendant, having made an express promise, is not relieved from his obligation to perform it because the plaintiff has entered into a previous contract with another person to deliver to his order. The defence would be available under the general issue; but the plea was allowed on the authority of *Shadwell* v. *Shadwell* (9 C. B. (N. S.) 159). This is an attempt to question the decisions on this subject, which have been uniform from the time of *Jesson* v. *Solly* (4 Taunt. 52).

The Court then called on

C. Pollock, to support the plea. There is no consideration to support the promise. The plea shews that the consideration alleged in the declaration is the doing that which the plaintiffs, by their contract with other persons, were bound to do. The charter-party only specifies the time and mode in which the cargo is to be discharged, as between the charterer and shipowner. [Martin, B. You must establish this, that if a person says to another, 'The goods which I have in my ship are yours; but I will not deliver them unless you pay my lien for freight,' which the latter agrees to do, the delivery of the goods is no consideration to support the promise to pay.] The cargo is the property of the defendant, and the agreement to deliver to him that which he was entitled to have was a nudum pactum. In Black. Com., vol. 2, p. 450, it is said :—'If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price, unless the property had been previously altered by a former sale.' [Wilde, B. That is the case of a purchase of goods, the property in them being already in the purchaser; but here the plaintiffs will not deliver the cargo to the defendant, whereupon the defendant says, 'If you will deliver it to me, I will discharge it in a certain manner.'] The plaintiffs were under a prior legal obligation to deliver the cargo, and therefore the promise to the defendant to do the same thing was

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void. Where a plaintiff discharged one of two joint debtors, it was held that a promise by a third person to pay the debt, in order to obtain the discharge of the other debtor, was void for want of consideration: *Herring* v. *Dorell* (8 Dowl. P. C. 604). So, if A. be illegally arrested by B. for a debt, a promise by C. to pay the debt claimed by B., in consideration of B.'s releasing A. out of custody, is void: *Atkinson* v. *Settree* (Willes, 482). [Wilde, B. In those cases there was a legal right to the performance of the very act which was bargained for: it is not so here. Martin, B. Suppose a man promised to marry on a certain day, and before that day arrived he refused, on the ground that his income was not sufficient, whereupon the father of the intended wife said to him: 'If you will marry my daughter, I will allow you 1000l. a year.' Could not that contract be enforced?] There would be no consideration for such a promise, the party being already under an obligation to marry. A promise by a captain to pay his sailors increased wages for performing their duty during a storm is void for want of consideration. [Martin, B. That proceeds on the ground of public policy. Wilde, B. It often happens that when goods arrive in a ship, and there is a lien upon them, a merchant who wants to get possession of the goods promises to pay the lien if the master will deliver them to him. A man may be bound by his contract to do a particular thing, but while it is doubtful whether or no he will do it, if a third person steps in and says, 'I will pay you if you will do it,' the performance is a valid consideration for the payment. Martin, B. If a builder was under a contract to finish a house on a particular day, and the owner promised to pay him a sum of money if he would do it, what is to prevent the builder from recovering the money?] As the plaintiffs would be doing a wrong by not fulfilling their contract, it must be presumed that the prior legal obligation, and not the subsequent promise, was the motive for their delivery of the cargo.

MARTIN, B.—I am of opinion that the plea is bad, both on principle and in law. It is bad in law because the ordinary rule is, that any act done whereby the contracting party receives a benefit is a good consideration for a promise by him. Here the benefit is the delivery of the coals to the defendant. It is con-

sistent with the declaration that there may have been some dispute as to the defendant's right to have the coals, or it may be that the plaintiffs detained them for demurrage ; in either case there would be good consideration that the plaintiffs, who were in possession of the coals, would allow the defendant to take them out of the ship. Then is it any answer that the plaintiffs had entered into a prior contract with other persons to deliver the coals to their order upon the same terms, and that the defendant was a stranger to that contract ? In my opinion it is not. We must deal with this case as if no prior contract had been entered into. Suppose the plaintiffs had no chance of getting their money from the other persons who might perhaps have become bankrupt. The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiffs had previously contracted with third parties to deliver to their order.

WILDE, B.—I am also of opinion that the plaintiffs are entitled to judgment. The plaintiffs say, that in consideration that they would deliver to the defendant a cargo of coals from their ship, the defendant promised to discharge the cargo in a certain way. The defendant, in answer, says, ' You made a previous contract with other persons that they should discharge the cargo in the same way, and therefore there is no consideration for my promise.' But why is there no consideration ? It is said, because the plaintiffs, in delivering the coals are only performing that which they were already bound to do. But to say that there is no consideration is to say that it is not possible for one man to have an interest in the performance of a contract made by another. But if a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding. Here the defendant, who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him. I accede to the proposition that if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that

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where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing. Therefore, deciding this matter on principle, it is plain to my mind that the delivery of the coals to the defendant was a good consideration for his promise, although the plaintiffs had made a previous contract to deliver them to the order of other persons.

Judgment for the plaintiffs.[1]

Elsee v. Gatward.

'By the common law, a *mandatary*, or one who undertakes to do an act for another, without reward, is only responsible for a *misfeasance*, but not for a *nonfeasance*, even though special damages are averred.'—Per Kent, C.J., in *Thorne* v. *Deas* (1809) 4 Johnson (American) 84.

ELSEE *v.* GATWARD (1793) 5 T. R. 143

This was an action upon the case. The first count in the declaration stated that the plaintiffs on the 29th of August 1791 were about to build a warehouse, &c. and to re-build and repair certain parts of a dwelling-house and stables, &c. and were desirous of having the warehouse completely tiled and covered in, and the front of the dwelling-house re-built, on or before the first of November then next, and also of having the bricklayers' and carpenters' works of the warehouse completely finished on or before the first of December, and the whole of the remaining repairs finished on or before the 25th December then next, and thereupon the plaintiffs on the 29th of August 1791, at the special instance and request of the defendant, who was a builder, and had full notice of the premises, retained and employed the defendant to do and perform all and singular the bricklayers' and carpenters' works which should be requisite on the occasion aforesaid within the several times hereinbefore mentioned for the completion thereof respectively; and although the defendant afterwards accepted of such retainer and employment upon the terms aforesaid, and could and ought to have completed all such bricklayers' and carpenters' works within the said respective times, yet the defendant contriving to injure the plaintiffs, &c. did not, nor would, completely tile or otherwise cover in the said

[1] Pollock, C.B., and Channell, B., were absent.

warehouse, &c. on or before the said 1st of November, nor did nor would finish the bricklayers' and carpenters' works of the warehouse on or before the said 1st day of December, and the whole of the remaining repairs on or before the said 25th of December, &c. but on the contrary permitted the said warehouse to continue untiled and uncovered, &c. in consequence of which said neglect of the defendant the walls of the said premises were greatly sapped and rotted, and the ceilings damaged and spoiled, and the plaintiffs were obliged to continue tenants of another warehouse and stables, &c. and were thereby put to additional expence, &c. The second count stated that the plaintiffs on the 29th of August 1791, being possessed of divers old materials of buildings, retained and employed the defendant at his instance and request to do and perform certain bricklayers' and carpenters' works upon divers buildings and premises of them the plaintiffs, and to use and apply in and about those works all such parts of the old materials as were fit and proper for that purpose, and that although divers parts of the said old materials were fit and proper to have been used and applied in and about the said works, yet the defendant, contriving to injure the plaintiffs in this behalf, and to enhance the expence of the bricklayers' and carpenters' works, did not nor would use and apply in and about the said works such parts of the old materials as were fit, &c. but refused so to do, and wrongfully and injuriously used and applied in and about the same works other new and expensive materials in the stead of such old materials as were fit and proper for the same purposes; whereby the plaintiffs were put to an unnecessary expence, &c. and the old materials became wholly useless, &c. There was a third count in trover for the old materials.

The defendant demurred to the two first counts; alleging for causes that, notwithstanding the whole of the supposed causes of action in those counts were in the nature of a nonfeazance, and consisted in the non-performance of certain matters and things in those counts mentioned as having been omitted to be done by the defendant, it was not stated in either of those counts, nor did it thereby appear, that the defendant by any promise, undertaking, contract or agreement, was bound to the performance of those several matters or things, &c. That, although the

ELSEE v. GATWARD. several supposed causes of action in those counts were founded upon implied contracts in law, no sufficient ground or consideration to raise or support such implied contracts was stated. That there was not stated, nor did it appear, in those counts that there was any promise or contract on the part of the defendant, upon which the breaches in those counts could operate. And that those counts did not contain any cause of action against the defendant, &c. The parties went to trial, when a verdict was given for the defendant on the count in trover, and conditional damages assessed for the plaintiffs on the two counts demurred to.

LORD KENYON, Ch.J.—If this had been an action of assumpsit, it could not have been supported for want of a consideration; it would have been nudum pactum. And if both the counts be not good, the defendant is entitled to judgment. Now I do not think that the first count in the declaration is good in law. It states that the defendant, who is a carpenter, was retained by the plaintiffs to build and to repair certain houses; but it is not stated that he was to receive any consideration, or that he entered upon his work. No consideration results from his situation as a carpenter, nor from the undertaking: nor is he bound to perform all the work that is tendered to him; and therefore the amount of this is, that the defendant has merely told a falsehood, and has not performed his promise; but for his non-performance of it no action can be supported. This is warranted by Lord Holt's opinion in *Coggs* v. *Bernard*, where recognising the case in 11 H. 4, 33, he said—'There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie.' And on this opinion I think I may safely rely, especially as the justice of the case will not be altered by the form of the action; for if assumpsit will not lie in such a case, there is no technical reasoning that will support such an action as for a tort. In that case Powell, J. said—'An action will not lie for not doing the thing for want of a sufficient consideration; but if the bailee will take the goods into his custody, he shall be answerable for them; for the taking of the goods into his custody is his own act.' Lord Holt there put several cases to establish this position, which will reconcile the cases now cited on the part

of the plaintiffs. In *Brown* v. *Dixon*, the defendant had received the dog into his possession. This case is very distinguishable from those of common carriers and porters, from whose situations certain duties result; they are bound by law to carry goods delivered to them, and are by law entitled to a recompence: but no such duty results from the situation of a carpenter; he is not bound, as such, to perform all the work that is brought to him. It appears to me, therefore, that the first count cannot be supported, there being no consideration expressly stated, nor any consideration resulting from the defendant's employment as a carpenter; though, had the defendant performed the work, he might have recovered a satisfaction on a quantum meruit. Upon the authority of *Coggs* v. *Bernard*, and the cases there noticed, not contradicted by any other decision, I think that the first count for nonfeazance is bad, but that the second count may be supported. It is there stated that the defendant entered upon his employment, and that he did not do that which he ought to have performed according to the retainer. In that count it is stated that he undertook to use the old materials, that in fact he did not use those, but substituted new ones in their stead, thereby enhancing the expence to the plaintiffs. This comes within the case mentioned by Lord Holt in *Coggs* v. *Bernard*, speaking of the same case in the Year-Books, 'But there the question is put to the Court, what if he had built the house unskilfully; and it was agreed in that case an action would have lain;' for though the defendant could not have been compelled to build this house, and to use the old materials, yet having entered upon the contract, he was bound to perform it; and not having performed it in the manner proposed, an action lies against him.

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ASHURST and GROSE, JJ., delivered judgments to the same effect.

Judgment for the defendant.

[The cases cited by Lord Kenyon are reported as follows: *Coggs* v. *Bernard* 2 Ld. Raym. 909; *Brown* v. *Dixon* 1 T. R. 274. (Edd.)]

WELBY v. DRAKE.

'If the debtor pays a portion of the debt, it does not enure as a discharge of the whole, though so agreed, but if a stranger pays a part of the debt in discharge of the whole, the debt is gone, because it would be a fraud on the stranger to proceed. So, in the case of a composition made with a body

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of creditors, the assent to receive the composition discharges the debt, because otherwise fraud would be committed against the rest of the creditors.'[1]— Per Willes, J., in *Cook* v. *Lister* (1863) 13 C. B. (N. S.) at p. 595.

WELBY *v.* DRAKE (1825) 1 C. & P. 557

Assumpsit against the defendant as drawer of a bill for £18 3*s.* 11*d.*, which had been returned unaccepted.

It appeared that the plaintiff had agreed that if the defendant's father would pay him £9, he would accept it in satisfaction of the whole debt; and this sum of £9 was accordingly paid by the father.

Chitty, for the defendant, contended, that though a party himself, by paying a less sum than is due, does not discharge the debt, yet if, in consideration of a third person coming forward to pay a less sum, the creditor agrees to take it in satisfaction, and that a less sum is so paid, it cancels the debt.

ABBOTT, C.J.—If the father did pay the smaller sum in satisfaction of this debt, it is a bar to the plaintiff's now recovering against the son; because by suing the son he commits a fraud on the father, whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability.

Verdict for the defendant.

[1] This passage is cited with approval by Farwell, L.J., in *Hirachand Punamchand* v. *Temple* [1911] 2 K. B. at p. 341. [Edd.]

'A contract by an infant for the supply of goods to him cannot be enforced unless the articles be necessaries, the policy of the law being directed to the protection of infants. In point of fact, a tradesman dealing on credit with an infant does so at his peril, and must lose his money (that is, if the infant does not voluntarily pay him) unless he can prove that the goods supplied were necessaries for the infant according to his station in life. That being the law we come to the question, What are necessaries? To determine this, we must take into account what the infant had at the time of giving the order. For example: a watch may be primâ facie in some cases a necessary, but if it turned out that the infant was already supplied with a watch or watches, the one ordered could not be a necessary. It is said, however, that, even if regard must be had to the supply which the infant has at the time of the order, where it is in the tradesman's knowledge that the infant is amply supplied, yet this is not so if the tradesman is ignorant of that fact. If this contention were correct, the protection given to the infant would depend entirely on what might be the state of knowledge of the tradesman, and one effect would be to deprive the infant of the protection intended to be extended to him by the law. In my view it is immaterial whether the plaintiffs did or did not know of the existing supply, just as it is immaterial whether they did or did not know that the defendant was a minor.'—Per Lopes, J., in *Barnes* v. *Toye* (1884) 13 Q. B. D. at p. 413.

NASH *v.* INMAN [1908] 2 K. B. 1

APPLICATION for judgment or new trial.

The action was brought by specially indorsed writ by a tailor carrying on business in Savile Row, London, for 145*l.* 10*s.* 3*d.* for clothes supplied to the defendant while an undergraduate at Cambridge University between October 29, 1902, and June 16, 1903. The defendant was an infant at the time of the sale and delivery of the goods. He had been at school at Uppingham, and in October, 1902, he went up as a freshman to Trinity College, Cambridge. He was the son of an architect of good position, who had a town house at Hampstead, and a country establishment, called Wade Court, near Havant. The clothes supplied to the defendant included, among other things, eleven fancy waistcoats at two guineas each, or 1*l.* 15*s.* for cash. Upon an application for judgment under Order XIV., the defendant set up the plea of

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infancy, and the action was adjourned into Court and was tried before Ridley J. and a special jury. At the trial the plaintiff claimed only 122*l.* 19*s.* 6*d.*, the cash price of the goods, in lieu of 145*l.* 10*s.* 3*d.*, the credit price. The only witness called on behalf of the plaintiff was a traveller in his employ, who stated that he went to Cambridge and other places to solicit orders for the plaintiff, and that, hearing that the defendant was spending money freely and was likely to be a good customer, he called upon him personally at his lodgings in Cambridge and obtained the first order for clothes; and he gave evidence as to the goods supplied, and stated that they were charged for at the usual prices.

Counsel for the defendant thereupon submitted that, subject to his formally proving infancy, which was not admitted, there was no evidence to go to the jury, and he called the defendant's father, who proved the date of the defendant's birth, and then went on to state that he was satisfied that his son on going up to the university was amply supplied with proper clothes according to his position; and he gave particulars of his outfit. The learned judge then held that there was no evidence to go to the jury that the goods were necessaries, and directed judgment to be entered for the defendant.

The plaintiff applied for judgment or a new trial, on the ground that the judge himself had decided the issues of fact instead of leaving them to the jury.

COZENS-HARDY, M.R.—This case is undoubtedly one of difficulty and also, I think, one of importance. It is an action by a tailor against Mr. Inman, who was at the date of the transactions in question an infant. There were no pleadings in the action. There was merely a writ and an application under Order XIV., and the action was adjourned into Court, and came on for trial before Ridley J. and a special jury. In substance the position is this: The plaintiff sues the defendant for goods sold and delivered. The defendant pleads infancy at the date of the sale, and his plea is proved. What is the consequence of that? The consequence of that is that the Infants' Relief Act, 1874, becomes applicable. Under that Act all contracts for goods supplied are absolutely void, the only exception being contracts for necessaries. Then s. 2 of the Sale of Goods Act, 1893, provides as follows: 'Capacity

to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire propery.' That, of course, includes the Act of 1874. Then follows this proviso: 'Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.' The section then defines necessaries as follows: 'Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.' What is the effect of that? The plaintiff sues for goods sold and delivered. The defendant pleads infancy. The plaintiff must then reply, 'The goods sold were necessaries within the meaning of the definition in s. 2 of the Sale of Goods Act, 1893.' It is not sufficient, in my view, for him to say, 'I have discharged the onus which rests upon me if I simply shew that the goods supplied were suitable to the condition in life of the infant at the time.' There is another branch of the definition which cannot be disregarded. Having shewn that the goods were suitable to the condition in life of the infant, he must then go on to shew that they were suitable to his actual requirements at the time of the sale and delivery. Unless he establishes that fact, either by evidence adduced by himself or by cross-examination of the defendant's witnesses, as the case may be, in my opinion he has not discharged the burden which the law imposes upon him. Our attention has been called by Mr. McCardie, in his very able and learned argument, to a number of authorities going back for a very long period, which he said established that the burden on a plaintiff who supplied goods to an infant was simply to shew that the goods were of a class which might be necessaries, having regard to the position in life of the defendant and his family, and that, unless the judge withdrew the case from the jury on the ground that the articles in question could not be necessaries, it was for the jury to find as a matter of fact, Aye or No, were these articles necessaries? It had never, he said, been the law that the plaintiff was required to go into the question, which might present great difficulties, of whether or not the goods were actually required by the defendant at the date of the sale, or, in other words, to say what was the state of the defendant's

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wardrobe at the time when the goods were ordered. I think there is very great force up to a certain point in that argument. But it must be remembered that the law on this subject has been developed and altered in the course of the last century. It was until quite recently doubted whether it was even admissible to prove that the infant was supplied with goods of the class—being goods which might properly be necessaries—at the date when the contract was made, so that he really did not want any more. It was not until the decision of the Divisional Court in *Barnes* v. *Toye* (13 Q. B. D. 410) in 1884, overruling the direction given by A. L. Smith J., that it could be said to be at all established that that was even admissible evidence unless you went further and proved that the plaintiff knew he was sufficiently supplied. The point arose again in *Johnstone* v. *Marks* (19 Q. B. D. 509) before what was no doubt a Divisional Court, but it was composed of three members of the Court of Appeal, Lord Esher M.R., Lindley L.J., and Lopes L.J. In that case the county court judge had rejected evidence to prove that the defendant was sufficiently supplied with clothes at the time of the sale. Lord Esher said: 'I am of opinion that the evidence was improperly rejected. It lies upon the plaintiff to prove, not that the goods supplied belong to the class of necessaries as distinguished from that of luxuries, but that the goods supplied when supplied were necessaries to the infant. The circumstance that the infant was sufficiently supplied at the time of the additional supply is obviously material to this issue, as well as fatal to the contention of the plaintiff with respect to it.' Lindley L.J. said: 'If an infant can be made liable for articles which may be necessaries without proof that they are necessaries, there is an end to the protection which the law gives him. If he has enough of such articles, more cannot possibly be necessary to him.' Although it may be true that the language which I have just read from the judgments of Lord Esher and Lindley L.J. goes further than was absolutely necessary for the decision of the case, that language is perfectly clear and unambiguous, and seems to me to be logically involved in the definition of necessaries. After those two decisions there was passed in the year 1893 an Act of Parliament which defines, in a manner that admits of no doubt, what are those necessaries for which, and for which alone,

an infant can be made liable on assumpsit, and that definition in terms includes the second element which Lord Esher and Lindley L.J. said was involved in the term 'necessaries,' and the burden of proving which, they said, rested on the plaintiff. That being so, how does the matter stand? The plaintiff called evidence to prove the delivery of the goods. It is not of course contended, and it could not be contended, that the infant would be liable for the credit price or for the cash price of the goods, because by the terms of the statute he is only liable for a reasonable price, but that is a subsidiary point. There being no pleadings, the infancy of the defendant was not admitted, and the father was called to prove the date of his son's birth. There was no cross-examination as to that, and the infancy is not disputed. Then he went on to give evidence, which was quite clear and explicit and was not shaken in cross-examination, that the infant, who was an undergraduate at Cambridge, and had just gone up to the university when these goods were supplied, was in fact supplied with clothes suitable and necessary and proper for his condition in life, and for his position as an undergraduate of Trinity College, Cambridge. The learned judge ruled as a matter of law that there was no evidence fit to be submitted to the jury that these articles, or any of them, were necessaries within the meaning of the statutory definition, and, thinking as I do that there was no evidence in support of that which was a necessary issue, I cannot say that the learned judge was wrong in the view which he took. We have scarcely heard any suggestion that there was even a scintilla of evidence to support that which is an affirmative issue, that the goods were suitable to the requirements of the infant. Nay more, I think, if the matter had been left to the jury, and the jury had found that they were suitable to the requirements of the infant at that time, and application had been made for a new trial, it would have been the duty of this Court to grant a new trial on the ground that there was no evidence to support the verdict, and that it was perverse. Under these circumstances it seems to me that this appeal fails, and that there is no ground for interfering with the judgment which was entered for the defendant.

FLETCHER MOULTON, L.J.—I am of the same opinion. I think

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that the difficulty and at the same time the suggestion of hardship to the plaintiff in such a case as this disappear when one considers what is the true basis of an action against an infant for necessaries. It is usually spoken of as a case of enforcing a contract against the infant, but I agree with the view expressed by the Court in *Rhodes* v. *Rhodes* (44 Ch. D. 94), in the parallel case of a claim for necessaries against a lunatic, that this language is somewhat unfortunate. An infant, like a lunatic, is incapable of making a contract of purchase in the strict sense of the words; but if a man satisfies the needs of the infant or lunatic by supplying to him necessaries, the law will imply an obligation to repay him for the services so rendered, and will enforce that obligation against the estate of the infant or lunatic. The consequence is that the basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words the obligation arises *re* and not *consensu*. I do not mean that this nicety of legal phraseology has been adhered to. The common and convenient phrase is that an infant is liable for goods sold and delivered provided that they are necessaries, and there is no objection to that phraseology so long as its true meaning is understood. But the treatment of such actions by the Courts of Common Law has been in accordance with that principle I have referred to. That the articles were necessaries had to be alleged and proved by the plaintiff as part of his case, and the sum he recovered was based on a quantum meruit. If he claimed anything beyond this he failed, and it did not help him that he could prove that the prices were agreed prices. All this is very ancient law, and is confirmed by the provisions of s. 2 of the Sale of Goods Act, 1893—an Act which was intended to codify the existing law. That section expressly provides that the consequence of necessaries sold and delivered to an infant is that he must pay a reasonable price therefor.

The Sale of Goods Act, 1893, gives a statutory definition of what are necessaries in a legal sense, which entirely removes any doubt, if any doubt previously existed, as to what that word in legal phraseology means. [The Lord Justice read the definition.] Hence, if an action is brought by one who claims to enforce against an infant such an obligation, it is obvious

that the plaintiff in order to prove his case must shew that the goods supplied come within this definition. That a plaintiff has to make out his case is, I should have thought, the first lesson that any one studying English law would learn; and the elaborate argument of Mr. McCardie that if you look at the authorities in the past, going back nearly a hundred years, you will find cases in which particular defendants might have taken a higher standpoint and insisted upon a right which they did not insist on does not appear to me to touch the plain and obvious conclusion that in order to succeed in the action the plaintiff must shew that he has supplied necessaries. That is to say, the plaintiff has to shew, first, that the goods were suitable to the condition in life of the infant; and, secondly, that they were suitable to his actual requirements at the time—or, in other words, that the infant had not at the time an adequate supply from other sources. There is authority to shew that this was the case even before the Act of 1893. In *Johnstone* v. *Marks* (19 Q. B. D. 509) this doctrine is laid down with the greatest clearness, and the ratio decidendi of that case applies equally to cases since that Act. Therefore there is no doubt whatever that in order to succeed in an action for goods sold and delivered to an infant the plaintiff must shew that they satisfy both the conditions I have mentioned. Everything which is necessary to bring them within s. 2 it is for him to prove.

Passing on from general principles, let me take the facts of the present case. In my opinion they raise no point whatever as to the duty of the judge as contrasted with the duty of the jury arising from the peculiar character of the action. We have only to follow the lines of the law consistently administered by this Court for many more years than I can think of, an example of which as applied to the case of the supply of necessaries to an infant is given by the decision of the Court of Exchequer Chamber in the case of *Ryder* v. *Wombwell* (L. R. 4 Ex. 32).[1] Questions of law are for the judge; questions of fact are for the jury; but, as the Court there laid down, the particular question of fact in issue in such a case, like all other questions of fact, ought not to be left to the jury by the judge unless there is evidence upon which they could reasonably find

[1] See note at end of this case.

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in the affirmative. The issue in that case was whether certain articles were suitable to the condition in life of the defendant, the infant, and the Court of Exchequer Chamber thought that no jury could reasonably find that those articles were suitable to the condition of that defendant, and therefore they said that the judge—not by reason of any peculiar rule applicable to actions of this kind, but in the discharge of his regular duties in all cases of trial by a jury—ought not to have left the question to the jury because there was no evidence on which they could reasonably find for the plaintiff. We have before us a similar case, in which the issue is not only whether the articles in question were suitable to the defendant's condition in life, but whether they were suitable to his actual requirements at the time of the sale and delivery; and how does the evidence stand? The evidence for the plaintiff shewed that one of his travellers, hearing that a freshman at Trinity College was spending money pretty liberally, called on him to get an order for clothes, and sold him within nine months goods which at cash prices came to over 120*l.*, including an extravagant number of waistcoats and other articles of clothing, and that is all that the plaintiff proved. The defendant's father proved the infancy, and then proved that the defendant had an adequate supply of clothes, and stated what they were. That evidence was uncontradicted. Not only was it not contradicted by any other evidence, but there was no cross-examination tending to shake the credit of the witness, against whose character and means of knowledge nothing could be said. On that uncontradicted evidence the judge came to the conclusion, to use the language of the Court in *Ryder* v. *Wombwell* (L. R. 4 Ex. 32), that there was no evidence on which the jury might properly find that these goods were necessary to the actual requirements of the infant at the time of sale and delivery, and therefore, in accordance with the duty of the judge in all cases of trial by jury, he withdrew the case from the jury and directed judgment to be entered for the defendant. In my opinion he was justified by the practice of the Court in so doing, and this appeal must be dismissed.

BUCKLEY, L.J.—The defendant, having been at school at Uppingham, went as a freshman to Trinity College, Cambridge,

in October, 1902. The plaintiff, who was a tailor carrying on business in Savile Row, sent a traveller to Cambridge to solicit orders. The traveller has stated in evidence that he was told there was a young man spending money there very freely, so he called upon him. At first he got no order, but he pressed for orders, and subsequently got orders, with the result that between October 29, 1902, and June 16, 1903, the defendant had run up a bill of 145*l.* odd for clothing of an extravagant and ridiculous style having regard to the position of the boy. The tailor now sues the defendant for 145*l.* The defence is infancy. That action is brought in contract. I understand the law before 1874 to have been this: an infant could contract, and under some circumstances the infant could enforce the contract, although it could not be enforced against him—e. g., *Farnham* v. *Atkins* ((1670) 1 Siderfin, 446). At common law, irrespective of statute, the contracts of an infant were voidable except such as were necessarily to his prejudice; these last were void. Speaking generally, the consequence of the infant's contract was that inasmuch as he was an infant the contract (with the exception of certain contracts) could not during infancy be enforced against him, but when he came to majority he might, if he pleased, ratify and confirm it, and if he did so both parties were bound. The obligation was in contract, but contract of such a kind that as against the infant at any rate it could not be enforced. It was a voidable contract. In that state of things the Act of 1874 was passed. That Act relates to certain contracts and renders them for the first time void. The classes of contract which are not referred to in the Act remain as they were before. The Act of 1874 provides that 'all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void,' subject to a certain proviso which mentions voidable contracts. The contract for necessaries therefore is excepted and is left as a contract which is not void. The plaintiff, when he sues the defendant for goods supplied during infancy, is suing him in contract on the footing that the contract was such as the infant, notwithstanding infancy, could make. The defendant, although

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he was an infant, had a limited capacity to contract. In order to maintain his action the plaintiff must prove that the contract sued on is within that limited capacity. The rule as regards liability for necessaries may, I think, be thus stated: an infant may contract for the supply at a reasonable price of articles reasonably necessary for his support in his station in life if he has not already a sufficient supply. To render an infant's contract for necessaries an enforceable contract two conditions must be satisfied, namely, (1.) the contract must be for goods reasonably necessary for his support in his station in life, and (2.) he must not have already a sufficient supply of these necessaries. The defence that the goods were not necessaries will be made out by shewing either that in what I may call their innate quality, having regard to the position in life of the defendant, they were such that he could not want them, or that, supposing the goods were capable of being necessaries, he had already enough, so that he did not want them. If in the action it is put in issue that the goods supplied were not necessaries on those two grounds, or on either of them, the onus is on the plaintiff to shew that they are necessaries. He is suing upon a contract which the defendant cannot make except under defined circumstances, and it is for him to shew that the defined circumstances enabling the infant to contract existed. What took place here was this. The plaintiff called his traveller, who gave evidence as to the goods supplied. At the conclusion of that evidence Mr. Atkin, for the defendant, submitted that, subject to his proving that the defendant was an infant, there was no evidence to go to the jury. He put the father in the box to prove the infancy, and then he put some further questions to the witness addressed to the point whether the boy was already sufficiently supplied with clothing, and the evidence of the father on that point was taken. The question whether or not the boy already had a sufficient supply of clothes is not a question of law, but a question of fact, and of course all questions of fact are for the jury. No doubt in these cases involving the question whether the goods are necessaries or not it is difficult to draw the line between law and fact. As regards the position in life of the boy you must have evidence, and it may be that you cannot even determine whether the article from its innate quality is capable of coming under the head

of necessaries until you know what his station in life is. Therefore to enable the judge to determine as a question of law whether the goods are such as are capable of being in law necessaries some evidence is required. But certainly the issue whether the defendant was already adequately supplied or not was a question of fact and was for the jury. The doubt I have in this case is whether at the conclusion of the evidence the judge ought to have left the matter to the jury with a direction that they ought to find their verdict in a particular way, or whether he ought to have withdrawn it as he did. Perhaps the more regular course would have been for the judge to have directed the jury to find for the defendant on the ground that there was no evidence to justify a verdict for the plaintiff. It does not matter much which way it is put. I arrive at the conclusion in point of fact that there was no evidence to go to the jury to satisfy the affirmative that these goods were necessaries, and consequently I think that the judge was right in directing judgment to be entered for the defendant.

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Appeal dismissed.

The dissenting judgment of Bramwell, B., in the lower Court [L. R. 3 Ex. at p. 95] which is generally regarded as the leading statement on the meaning of 'necessaries' was as follows:—

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In this case, on a replication to a plea of infancy, the jury have found two articles to have been necessaries for the defendant. The articles are, a gold drinking cup, the price of which is 15*l.* 15*s.*, and a pair of things called 'solitaires,' explained to us to mean articles which may be used as studs to fasten the wristbands of a shirt. The price of these solitaires is 25*l.*, owing to their costly material and manufacture, and the jewels with which they are adorned. I believe I am right in saying that studs fit for the purpose, and such as a gentleman may well wear, might be bought for a trifle, or the wristbands may be buttoned with buttons, scores of which may be bought for a few pence. It was said that the question was for the jury, that the rule is that where the article is one of an useful class, the question is one of fact to be decided by them. This argument was principally used in favour of the claim for the solitaires. I cannot agree to this. It is extremely difficult to name anything which cannot be put to some use. Ear-rings for a male, spectacles for a blind person, a wild animal, might be suggested. But even they might come within the argument in support of the drinking cup claim, viz., that they might be used for necessary and becoming presents. The argument seems to me to lead to an absurdity. Food is necessary; is it a question of fact, whether a daily dinner of turtle and venison for a month,

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is a necessary for a clerk with a salary of 1*l.* a week? A threepenny ride in an omnibus on a wet day may be a necessary for such a clerk, and save him its cost by saving his clothes. Is whether a coach and four is a necessary for him, a question of fact? Besides, suppose a jury ask what is the meaning of necessaries. Does it mean in law, as in strictness, something indispensable? The answer must be, no. Then when they ask what is the meaning, and it is expounded to them as being something reasonably required for the nourishment, clothing, lodging, education, and decent behaviour and appearance, according to station, how can such an explanation include these articles?

But I may fairly be asked what is the rule? It seems to me to be this. There are some things which cannot be necessaries. The ear-rings, the spectacles in the cases put, the wild animal, and all things which are useless except for amusement, or where the utility is the subordinate consideration and the ornament or amusement the principal. On the other hand, there are some things certainly necessaries, bread, meat, vegetables, water. There are also things which may or may not be, and which give rise to questions for a jury. For instance, an infant orders an expensive coat; but it appears his trade or calling is of that nature that such a coat is necessary for his health; or it is shewn that a coat at half the price would not last half the time. Or if he has ordered a broadcloth coat, and it is said he should have contented himself with fustian, evidence may be given as to his position, and as to how such people dress in that class in that neighbourhood, and then the question is for the jury. I am far from saying that the above is at once accurate and exhaustive, but I forbear from the attempt to make it so. Not to be more tedious, I think, therefore, that in this case the jury should have been told to find for the defendant. If the argument as to the drinking cup is right, and if the tradesman is bound to make no inquiry, why every case is for the jury, as an infant may always have some friend to whom he would like to give the useless article he has purchased. But I cannot see why that argument should be used. An infant must drink, and drink out of some vessel; therefore, the gold cup is in the class of useful articles. If the question was for the jury, still I think such a direction ought to have been given as would have precluded their going wrong, unless they gave a perverse verdict. I think necessaries ought to have been so defined and explained as to give them no opportunity of returning a wrong verdict, unless they did so wilfully. Of course, with this opinion I think if there was evidence to go to the jury, still the verdict was wrong, and there should be a new trial. It is observable that no one pledged his oath that these things were necessary, or gave any description of the articles,[1] of their utility, of the cost of other contrivances for the purpose.

Further, I think evidence was admissible to shew that the defendant was supplied with similar articles. Suppose a baker delivered 100 loaves daily to an infant, who could only consume one, would he be liable for the price of the other 99? Certainly not; because they were not necessaries. But

[1] A pair of solitaires, said to exactly resemble those purchased by the defendant, were produced by the plaintiff at the trial.

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what difference does it make on this question, that they are supplied by one baker or a hundred? The question is like that which arises where a married woman has dealt on credit. There it is a question of authority, here of capacity, depending on whether the woman or infant is sufficiently supplied. No doubt we are not concerned with the goodness or badness of the law, but I cannot help thinking it would be more correctly administered by juries, at least, on this head, if its reason and advantages were properly appreciated. It is not a law for the indemnity and defence of the infant who is sued merely; it is a law to deter people from trusting infants, and so save them from the consequences of the improvidence and inexperience natural to their age, an improvidence which would lead them into loss though all their dealings were with honest people, an inexperience which causes them to be no match for rogues. Modern legislation runs in the same direction of protecting the helpless and invalidating contracts from which they have not the sense or power to protect themselves. I think our judgment should be to enter a verdict for the defendant; if not, to order a new trial: and, in conformity with the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 44, the wrong verdict being no fault of the defendant, without costs.

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'In Coke upon Littleton, 172*a*, the note as to the power of an infant to bind himself by a writing states that there are some exceptions to his general inability, as "an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." It has been since held, in *Peters* v. *Fleming* (1840) 6 M. & W. 42, that under the term "necessaries" are included such articles as are useful and suitable to the state and condition of life of the party, and not merely such as are requisite for bare subsistence. It has been clearly held that contracts of apprenticeship and with regard to labour are not contracts to an action on which the plea of infancy is a complete defence, and the question has always been, both at law and in equity, whether the contract, when carefully examined in all its terms, is for the benefit of the infant. If it is so, the Court before which the question comes will not allow the infant to repudiate it.'—Per Kay, L.J., in *Clements* v. *London & North-Western Railway Co.* [1894] 2 Q. B. at p. 490.

ROBERTS *v.* GRAY [1913] 1 K. B. 520

Appeal from a decision of Lord Alverstone C.J.

This was an action in which the plaintiff claimed from the defendant, an infant, born March 28, 1891, 6000*l.* damages for breach of a contract to join him in a billiard-playing tour.

On May 12, 1910, an agreement was entered into between John Roberts of the first part, Joseph George Gray of the second

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part, and Harry William Gray (all described as billiardists) of the third part, whereby it was agreed :—

'1. The said John Roberts shall take the said Joseph George Gray in company with his father the said Harry William Gray and the said Joseph George Gray shall go with the said John Roberts so accompanied on a tour of the world as professional billiardists on the terms and conditions hereinafter contained.

'(A) The term of the said tour shall be for a period of eighteen months from the 2nd day of April 1911.

'(B) The said John Roberts shall pay all hotel and travelling expenses both by sea and land of himself and the said Joseph George Gray and the like hotel and travelling expenses of his father the said Harry William Gray.' [Travelling to be first class ; accounts to be rendered.]

(C) [provided for keeping accounts and furnishing weekly statements.]

(D) [provided for equal division of all receipts and emoluments.]

(E) [Roberts to be entitled to deduct disbursements in account.]

'(F) It is hereby agreed and understood between the parties hereto that the total hotel and travelling expenses of the said John Roberts and Joseph George Gray shall be paid and borne by each of them equally but that the said John Roberts shall defray the whole of same in the first place and also that of the said Harry William Gray and reimburse himself from the said Joseph George Gray's share of profits all such sums so incurred and expended by him as aforesaid but that in the event of such receipts earnings emoluments and gifts being insufficient to satisfy such expenditure neither of them the said Joseph George Gray or Harry William Gray shall be personally liable or responsible therefor.

'(G) The tour to be under the sole control and management of the said John Roberts.

'2. Nothing herein contained shall create or be deemed to create a partnership between the parties hereto and the said John Roberts shall save as aforesaid be solely liable for all payments and shall be solely responsible for all losses (if any) from the date hereof until the 1st day of October 1912.

'3. The parties hereto shall where same are available play

exclusively on billiard tables the manufacture of Alcock & Company Proprietary Limited.'

The plaintiff alleged that under the contract he expended much time and trouble and incurred liabilities in making arrangements for billiard matches and had suffered damage in consequence of the defendant's breach of the agreement. The plaintiff returned to England in March, 1911, and in April made various payments to the Grays for their expenses. Disputes arose about the kind of billiard balls to be used, and on April 20, 1911, the defendant J. G. Gray repudiated the contract. The plaintiff brought this action in May, 1911, and J. G. Gray counterclaimed rescission of the contract.

The action was tried in February, 1912, before the Lord Chief Justice and a special jury, when the jury found a verdict for the plaintiff on the questions left to them, namely, whether there was a false representation by the plaintiff; whether the defendant was thus induced to enter into the contract; and whether the plaintiff was ready and willing to carry out the contract. They assessed the damages at 1500*l*. The question whether the contract was beneficial to the infant was left to the Lord Chief Justice, who decided in favour of the plaintiff. J. G. Gray appealed.

COZENS-HARDY, M.R.—This appeal has been very ably argued by Mr. Matthews, but, having listened to everything he has urged upon us, I see no reason to differ from the view taken by the Lord Chief Justice. We have had our attention called to a great number of cases dealing with the circumstances under which and the extent to which an infant may be bound by, and be incapable of repudiating, a contract made by him during infancy. Far be it from me to say there has not been some development of this law since the age when the earliest cases which have been cited were decided, but it is important to remember that as early as Lord Coke—Co. Litt. 172 A—it has been held that an infant's contract for necessaries is binding, and it was laid down by him that that doctrine also applied not merely to bread and cheese and clothes, but to education and instruction. That has been construed by this Court in the case of *Walter* v. *Everard* ([1891] 2 Q. B. 369) in a very wide sense. Fry L.J. in

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that case pointed out that education must not be taken in its narrow technical sense as merely meaning education to enable a man by the work of his hands to hereafter maintain himself as an artisan, but has a much wider meaning than that; it applies to education and instruction in the social state in which the infant is, and in which he may expect to find himself when he becomes an adult.

Now, what is the effect of a contract which is entered into by an infant with reference to necessaries, including instruction and education? We have heard an argument forcibly put before us that such a contract may be good so far as the consideration has been executed, but that it cannot be enforced so far as it is executory. For that proposition I think there is no authority, and I certainly think that it is not open to this Court to say that there is any such rule. We are bound by *Clements* v. *London and North Western Ry. Co.* ([1894] 2 Q. B. 482). There the contract was a contract of service by an infant. A term of the service was that he should become a member of a society for the employees of the London and North Western Railway Company, and, in consideration of certain benefits, he was not to bring any action against the company in case of accidents whether due to the company's negligence or not. The Court considered the contract as a whole. It is quite idle to say 'look at the contract and see if there is one clause which is adverse to the infant.' The Court cannot consider whether that is for the infant's benefit and, if it is not, say that the whole contract is therefore void; it must look at the contract as a whole and see whether, looking at it as a whole, it is a contract for the infant's benefit, not merely a contract for necessaries, but if it is a contract which is on the whole for the infant's benefit. If so, what is the result? Lord Esher says if upon consideration of the whole of the contract there is a manifest advantage to the infant he cannot avoid it ([1894] 2 Q. B. 490). Then Kay L.J. says ([1894] 2 Q. B. 492): 'I agree with the Divisional Court that, on examination of the whole contract, it is for the benefit of the infant, although it contains terms that, standing alone, would not be for his advantage. There is, therefore, no right on the part of the infant to repudiate the contract.' A. L. Smith L.J., quoting with approval the passage in the judgment of Fry L.J., sitting, not in the Court of Appeal, but as

a judge of the Chancery Division, in *De Francesco* v. *Barnum* (45 Ch. D. 430) says ([1894] 2 Q. B. 495): 'There is another exception which is based on the desirableness of infants employing themselves in labour, therefore, when you get a contract for labour, and you have a remuneration of wages, that contract, I think, must be taken to be prima facie binding upon an infant. I take this to be good law. Prima facie, therefore, this contract is binding on the infant.' If, therefore, this is a contract falling within a class to which the doctrine of necessaries applies, and if, taken as a whole, it is for the infant's benefit, I see no foundation whatever for the argument that the infant is not liable for damages in the event of his repudiating or declining to perform the contract entered into. The Court has acted upon that in *Gadd* v. *Thompson* ([1911] 1 K. B. 304) to the extent of granting an injunction to restrain an infant from being guilty of a breach of a clause in a contract of service after he has left the employment. Here only damages are claimed and have been given.

It only remains, therefore, to consider that which I think is not really a very difficult problem. What is the nature of this contract? What was the station of the parties and what is the meaning of the agreement?

[His Lordship went through the contract, and was clearly of opinion that playing billiards in company with a noted player like John Roberts must be instruction of the most valuable kind for an infant who desired to make playing billiards the occupation of his life; and agreed with the Lord Chief Justice that the agreement was in effect for teaching, instruction and employment, and was reasonable and for the benefit of the infant.]

That being so, the Lord Chief Justice gave judgment for the plaintiff against the infant, and in my opinion the judgment which he gave was perfectly right and cannot be interfered with.

This appeal must be dismissed with costs.

FARWELL, L.J.—I am of the same opinion. The chief point in Mr. Matthews' argument does not, in my opinion, really arise. He has sought to convince us that assuming this contract was not a contract for necessaries it would be voidable by the infant. It is unnecessary to express any opinion on the point which

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Kay L.J. dealt with in the case of *Clements* v. *London and North Western Ry. Co.* ([1894] 2 Q. B. 494). The question to what extent that rule applies does not arise. This is clearly a contract for necessaries within the meaning which that phrase has had attached to it in the course of many centuries since Lord Coke wrote. It is in effect for board, lodging, travelling and employment all found at the plaintiff's expense for the infant and involved in the employment, and the education which a billiard player of receptive capacity could not fail to obtain from playing continually month after month with a great billiard player like John Roberts. Every item which goes to make up necessaries in the sense of a labour and education contract, except the express term to give the education, which would be necessary if it were an apprenticeship deed, is in this particular contract as much as as though, instead of finding the board and lodging on board ship and in various hotels, Roberts had found it in a house of his own where he gave exhibitions. I cannot doubt that this is a contract for necessaries.

Then the next thing is, is it for the benefit of the infant, because, although a contract for necessaries is prima facie binding, it may be shewn to contain terms so harsh as not to be binding on the infant. In my opinion, it is clearly for the benefit of the infant, and I see nothing to suggest that it is in the least harsh upon him.

Then the only point which remains is, is it not, notwithstanding that, voidable by the infant? It appears to me that is answered in an obiter dictum of Lord Abinger's in *Wood* v. *Fenwick* ((1842) 10 M. & W. 195, 204). Lord Abinger says: 'There can be no doubt that, generally speaking, a contract by an infant to receive wages for his labour is binding upon him.' To which counsel interjects: 'At all events, he may determine it at any time by notice.' Then Lord Abinger says: 'That would be a contradiction in terms: because, to say that he may contract, is to say that he may bind himself by the contract; how then can it be determined at his election the next day?' That is adopted by the decision of Lord Esher and the other Lords Justices in *Clements* v. *London and North Western Ry. Co.* ([1894] 2 Q. B. 482), and it would render the rule futile if we were to say that although the contract is for necessaries and although it is for his benefit he can yet repudiate

it if he thinks fit. In my opinion he cannot do so; the judgment was quite right; and this appeal fails.

HAMILTON, L.J.—I entirely agree. The first question is whether this was a contract for necessaries, or, in the words of Lord Coke, —Co. Litt. 172 A—whether it was a contract for the infant's 'good teaching or instruction whereby he may profit himself afterwards.' I think it is quite clear, as a matter of law, that this contract as framed was capable of being, and was rightly held to be, such a contract for necessaries. The circumstances that it is not expressed as a contract for employment; that the consideration for that which has to be done by the infant does not take the form of wages; and that he is not placed in such a relation to the plaintiff as would make him a servant, appear to me to be far from conclusive of the matter. Whether the contract is one for necessaries in this sense must depend upon its substance and not upon its form, and there was abundance of evidence here upon which it could be found by the learned Lord Chief Justice, who was, by agreement, the tribunal of fact, so far as the facts were involved, as well as of the law on this point, that a part and a most important part of this contract was the instruction that would be received by the defendant from playing constantly with the plaintiff, and also from playing under the conditions of a world-wide tour, a thing which a distinguished billiard player apparently contemplates as part of his career. It seems to me to be clear, therefore, upon the first question, that this contract is one for necessaries, and, in so far as the antithesis framed in *Cowern* v. *Nield* ([1912] 2 K. B. 419) by the Divisional Court is presented to us, I entertain no doubt that this is not such a contract as could be called a trading contract and is amply within the other side of the antithesis as stated by Phillimore J., namely, contracts relating to infant persons such as contracts for necessaries, of which he there mentions various kinds.

If this is a contract for necessaries, is there anything about it to prevent it being binding upon the infant? For this purpose it is necessary to consider whether it contains unusual and harsh and burdensome terms such as would prevent it from being a contract enforceable against the infant. The Lord Chief Justice, being again a tribunal both of fact and law, decided that there

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were no terms in this contract that would have that effect, and no reason has been suggested to us for differing from him upon this point.

There remains only one further argument, and that goes not to the nature of the contract, but to the form of the action. This contract was repudiated by the infant, the defendant, at an early stage, though not before some portion of the services contemplated by the plaintiff had been rendered by him, and was to a large extent an executory contract so that the remedy takes the form of a claim for damages. It is therefore suggested that the contract is not enforceable against the infant, although had he taken the benefit of the plaintiff's instruction he might then have been compellable to pay a quantum meruit for services received. I am unable to appreciate why a contract which is in itself binding, because it is a contract for necessaries not qualified by unreasonable terms, can cease to be binding merely because it is still executory. To my mind, it is the character of the contract, namely, a contract for necessaries in the wide sense of the term, and not the form of the remedy for its breach which the particular accidents of the case may give rise to, that must determine whether it is a contract that is binding on the infant or is only voidable at his option. If the contract is binding at all, it must be binding for all such remedies as are appropriate to the breach of it. Although no doubt the exception is introduced, not for the benefit of the tradesman, but for the benefit of the infant himself, when the circumstances of the contract are such as to bind the infant, he must in common justice be liable to a judgment for any form of remedy which his breach of contract has made it necessary for the plaintiff to seek.

I agree this appeal must be dismissed with costs.

Appeal dismissed.

Note on the nature of an infant's liability on contracts for necessaries.

It will be observed that in *Nash* v. *Inman* (*supra*) Fletcher Moulton, L.J., points out that the basis of the action against an infant for necessaries ' is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words the obligation arises *re* and not *consensu* '. The liability is indeed so far from being a purely contractual one that it may come into existence

even though the infant has entered into no contract at all; cf. *in re Clabbon* [1904] 2 Ch. 465, where Farwell, J., held that an infant who had received necessary relief from the Guardians was under a Common Law liability to repay its cost. It is in fact but one illustration of a principle of the Common Law, independent of contract, that 'whenever necessaries are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property'; per Cotton, L.J., in *re Rhodes, Rhodes* v. *Rhodes* (1890) 44 Ch. D. at p. 105.

'Obligations of this class', said Lindley, L.J., in the same case at p. 107, 'are called by the civilians *obligationes quasi ex contractu*.' Section 2 of the Sale of Goods Act, 1893, also places the liability on what can only be regarded as a quasi-contractual basis; for it requires an infant to pay a reasonable price (which may evidently not be the same as the price, if any, which he has agreed to pay), for necessaries 'sold and delivered' to him. The Section, it will be observed, says nothing of any liability to pay for necessaries which are merely bargained and sold to him, and it has never, it is believed, been decided whether or not an infant could be made liable for the breach of a merely executory contract for the purchase of necessary goods.

It appears therefore that in cases where necessary goods have been supplied to an infant, and the transaction executed, the trend of decisions, now confirmed by Statute, has been to place the liability not on a contractual, but on a quasi-contractual basis. But the infant's liability is not and never has been limited to the case of necessary goods actually supplied. It extends, not indeed to all contracts which it may be for the benefit of the infant to enter into (see *Cowern* v. *Nield* [1912] 2 K. B. 419), but certainly, provided the contract taken as a whole is for his benefit, to certain contracts relating to the infant's person, such as contracts of apprenticeship, and contracts for his lodging, education, or employment. Further in *Roberts* v. *Gray* the Court of Appeal definitely rejected the suggestion of counsel that such contracts could not be enforced against the infant while still executory; 'I am unable to appreciate,' said Hamilton, L.J., 'why a contract which is in itself binding, because it is a contract for necessaries not qualified by unreasonable terms, can cease to be binding merely because it is still executory.' It is difficult in face of words like these to regard the basis of the liability as invariably quasi-contractual. It would be possible to explain the apparent discrepancy of view by suggesting that an infant may incur liabilities for necessaries of two different kinds; a quasi-contractual liability to pay a reasonable money price for necessary goods sold and delivered to him, and a truly contractual liability in other cases. But the cases recognize no such distinction in the basis of liability. 'Necessaries' as long ago as Coke's time were not limited to necessary goods; 'an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction whereby he may profit himself afterwards': Co. Litt. 172 A. Modern cases also treat the liability on beneficial contracts of service, education and the like, as merely one branch of

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The truth seems to be that on this point as on many others the rules of English Law cannot without violence be classified under juristic categories framed with reference to another legal system. [Edd.]

CORPE v. OVERTON. 'It is clear that an infant cannot be absolutely bound by a contract entered into during his minority. He must have a right upon his attaining his majority to elect whether he will adopt the contract or not. It is, however, a different question whether, if the infant pays money on the footing of a contract, he can afterwards recover it back. If an infant buys an article which is not a necessary, he cannot be compelled to pay for it, but if he does pay for it during his minority he cannot on attaining his majority recover the money back.'—Per Turner, L.J., in *Ex parte Taylor* (1856) 8 De G. M. & G. at p. 257.

CORPE *v.* OVERTON (1833) 10 Bing. 252

The Plaintiff, while yet a minor, in October 1832, signed a written agreement to enter into partnership with the Defendant, a tailor; to pay him 1000*l.* for a share of the business; and on the 1st of January 1833 to execute a partnership deed with the usual covenants; 'and as a deposit for the due fulfilment of the same on the part of the said A. R. Corpe, the sum of 100*l.* is now paid to the said W. Overton as per receipt, on the condition of the same sum of 100*l.* being deducted from the amount of the said intended purchase, or otherwise in default of the said intended purchase not being duly completed by the said A. R. Corpe according to the aforesaid terms, the said sum of 100*l.* shall be forfeited to the said W. Overton; and he, the said W. Overton, shall be subject to no claim or demand whatever from any person or persons for the sum of 100*l.*, or any other amount, unless any disagreement should arise between the creditors of the said W. Overton and himself, so as to prevent the fulfilment of the said intended partnership; then, and in that case only, the said A. R. Corpe shall not be actually held liable to forfeit the said sum of 100*l.*; but such point to be decided by two arbitrators, one chosen by each said party.'

The Plaintiff, after depositing the 100*l.*, as recited in the above

agreement, discovered that he had been imposed upon by exaggerated representations as to the value of the Defendant's business; he therefore rescinded the contract as soon as he came of age; refused to execute the partnership deed; and brought an action against the Defendant for 100*l.* had and received by him to the Plaintiff's use.

At the trial before Alderson J. the jury found that the Plaintiff had paid the deposit on a fraudulent representation in the Defendant's balance sheet, and gave their verdict for the Plaintiff, damages 100*l.*

[A rule nisi to set aside this verdict was obtained.]

TINDAL, C. J.—

I think we may arrive at a right determination of this case without impeaching the decision in *Holmes* v. *Blogg*, (8 Taunt. 508) because the facts of the two cases are manifestly distinguishable. In *Holmes* v. *Blogg*, the infant had paid 15*l.* as his share of the consideration for a lease of premises in which he and his partner carried on the business of shoe-making. They occupied the premises from March till June, when the infant, coming of age, dissolved the partnership, relinquished the business, and sought to recover back the money he had paid the lessor for his lease. In that case, therefore, the sum of money sought to be recovered back, as having been paid without consideration, appeared to have been paid for something available, that is, for three months' enjoyment of the premises let to him and his partner; and the Plaintiff could not put the lessor again into the same situation. And though several general expressions are dropped by the Chief Justice in delivering his judgment, yet when he comes to apply them to the subject before the Court, he gives them a less extensive latitude. After referring to the opinion of Lord Mansfield, he goes on, 'What is the point here? That an infant having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to receive it back.'

The ground, therefore, of the judgment in *Holmes* v. *Blogg* was, that the infant had received something of value for the money he had paid, and that he could not put the Defendant in the same position as before. In the present case, the Plaintiff has paid to Overton 100*l.*, for which he has not received the slightest

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consideration. The money was paid, either with a view to a present or a future partnership. I understand it as having been paid with a view to a future partnership. In order to ensure performance of the contract, the infant paid down 100*l.*, which he was to forfeit in case of refusal to proceed. When he came of age, he declared that he had rescinded the contract; and it seems to me that he had a right to do so. From *Hill and Whittington's case* (Dy. 104, note), to *Whywall* v. *Champion* (Str. 1083), it has been always held, that an infant cannot incur liability by carrying on trade. If he cannot trade, a contract to enter into trade is one which he may avoid when he comes of age. Now, when he rescinds such a contract, he has a right to rescind the whole of it; and one of the terms of the contract in question being that he should pay down 100*l.*, if we were to determine that he has a right to rescind the contract and yet not to recover the money paid in advance, the protection which the law extends to an infant might be altogether eluded by allowing the other party to retain money so paid in advance. As it is plain, therefore, that the infant had a right to rescind the contract, the only point we have to look to with reference to *Holmes* v. *Blogg* is, whether he had derived any intermediate advantage from it. Now the partnership was not to be entered into till January 1833; and in the meanwhile the infant had derived no advantage whatever from the contract. The case of *Holmes* v. *Blogg* fails on that ground as an authority in point.

But there is another ground on which the Plaintiff is entitled to recover in this action. According to the old law, as laid down in Coke Littleton, 172 a., an infant is not bound by any forfeiture annexed to a contract, and his obligation with a penalty, even for necessaries, is absolutely void. What is this payment, in effect, but a sum handed over by way of a penalty? The principle which exempts an infant from a penalty must extend as well to a penalty enforced by handing over money in advance, as to penalties accruing on the breach of a condition; and the rule which has been obtained in this case must therefore be discharged.

GASELEE, BOSANQUET, and ALDERSON, J.J., delivered judgments to the same effect.

Rule discharged.

'In the first place, it appears to me that whilst Courts of Equity have interfered to make an infant restore property found in his possession which he had obtained by fraudulent misrepresentation, as, e.g., the promissory note in the old case of *Clarke* v. *Cobley* (2 Cox, 173); to compel the recognition, in regard to property in his possession, of rights and interests of persons whom he has misled into entering into transactions in regard to it (cf. *Watts* v. *Creswell*, 9 Vin. Abr. 415); and to prevent the payment over again to the infant of moneys of which he has procured the payment already by a representation of full age, as in *Cory* v. *Gertcken* (2 Madd. 40); there is no case in which I can find that a Court of Equity has given judgment against an infant in circumstances like the present, that is to say, in which it has interfered on the ground of the fraud of the infant, whereby he induced the making of the contract of loan, to order the infant to pay the plaintiff a sum equal to the sum borrowed under the void contract, and so, in effect, to the amount of the principal lent, to give validity as against the infant to a void contract.'—Per Kennedy, L.J., in *R. Leslie, Ltd.* v. *Sheill* [1914] 3 K. B. at p. 623.

R. LESLIE, LTD. *v.* SHEILL [1914] 3 K.B. 607

Appeal of the defendant from a decision of Horridge J. after trial with a common jury.

The plaintiffs were a firm of registered money-lenders, and they sued the defendant, to whom they had made two advances of 200*l.* each, to recover 475*l.*, being the amount of the advances with interest, on the ground that the defendant had obtained the advances by fraudulently representing that he was of full age at the time; in the alternative, they claimed 475*l.* as money had and received by the defendant to the use of the plaintiffs; the defendant was still a minor at the date of the issue of the writ, though he attained full age before the trial. The learned judge left the following question to the jury: 'Were the plaintiffs induced to make the two advances of 200*l.* each, or either of them, by the fraudulent misrepresentation of the defendant that he was twenty-one?'; to which the jury answered, 'Yes—both.' Upon further consideration, Horridge J. ordered judgment to be entered for the plaintiffs for 400*l.*

The defendant appealed.

KENNEDY, L.J. read the following judgment of

LORD SUMNER.—At the time of the transaction in question the appellant was an infant. He succeeded in deceiving some money-

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lenders by telling them a lie about his age, and so got them to lend him 400*l.* on the faith of his being adult. Perhaps they were simpler than money-lenders usually are; perhaps the infant looked unusually mature. At any rate when they awoke to the fact that they could not enforce their bargain and sought to recover the 400*l.* paid, charging him with fraud, the jury found that the appellant had been guilty of fraud, and he does not now complain of the verdict. On further consideration Horridge J. gave judgment against him for the full amount that he received.

It is not a pretty story to begin life with, and one might have expected that the appellant's chief anxiety would have been to live it down, but money is money, and I suppose 400*l.* is more than he cares to pay, or rather to repay, if he can manage to avoid it. Accordingly he appeals, alleging that there is no process of law by which the money-lenders can get their money back from him, and, if this is so, he must succeed on this appeal.

The claim first pleaded is for the amount of principal and interest, as damages sustained because by his fraud the plaintiffs have been induced to make and act upon an unenforceable contract. So long ago as *Johnson* v. *Pye* (1 Sid. 258) it was decided that, although an infant may be liable in tort generally, he is not answerable for a tort directly connected with a contract which, as an infant, he would be entitled to avoid. 'One cannot make an infant liable for the breach of a contract by changing the form of action to one ex delicto': per Byles J. in *Burnard* v. *Haggis* ((1863) 32 L. J. (C. P.) 189). 'A married woman,' says Pollock C.B. in *Liverpool Adelphi Loan Association* v. *Fairhurst* ((1854) 9 Ex. 422; 23 L. J. (Ex.) 163), speaking before the common law had been altered by Married Women's Property Acts, 'is liable for frauds committed by her on any person as for any other personal wrong. But when the fraud is directly connected with the contract with the wife and is the means of effecting it and parcel of the same transaction, the wife cannot be responsible or the husband be sued for it together with the wife. If this were allowed, it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture, for there is not a contract of any kind, which a feme covert could make whilst she knew her husband to be alive, that could not be treated as a fraud, for every such contract would

involve in itself a fraudulent representation of her capacity to contract. . . . In the case of an infant it was held for a similar reason that he could not be made liable for a fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him. . . . If the action should be maintainable "all the pleas of infancy would be taken away, for such affirmations are in every contract." ' The Chief Baron's quotation is from *Johnson* v. *Pye* (1 Sid. 258). As Lord Kenyon says in *Jennings* v. *Rundall* ((1799) 8 T. R. 335, at p. 337) alluding to *Zouch* v. *Parsons* ((1765) 3 Burr. 1804), 'this protection was to be used as a shield and not as a sword; therefore if an infant commit an assault or utter slander God forbid that he should not be answerable for it in a Court of justice. But where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a Court of law to enforce such contract.' It is perhaps a pity that no exception was made where, as here, the infant's wickedness was at least equal to that of the person who innocently contracted with him, but so it is. It was thought necessary to safeguard the weakness of infants at large, even though here and there a juvenile knave slipped through. The rule is well settled. No action of deceit lay against the present appellant and this claim was abandoned, but for the purposes of this case it is important to observe the principles on which an infant's immunity is established in this regard.

Nor does the other cause of action pleaded fare any better. To the claim for return of the principal moneys paid to the infant under the contract that failed, as money had and received to the plaintiffs' use, there are at least two answers: the infancy itself was an answer before 1874 at common law, and the Infants' Relief Act, 1874, is an answer now. An action for money had and received against an infant has been sustained, where in substance the cause of action was ex delicto: *Bristow* v. *Eastman* (1 Esp. 172), approved before 1874 in *In re Seager* (60 L. T. 665), and cited without disapproval in *Cowern* v. *Nield* ([1912] 2 K. B. 419) Even this has been doubted, but where the substance of the cause of action is contractual, it is certainly otherwise. To money had and received and other indebitatus counts infancy was a defence just as to any other action in contract: *Alton* v. *Midland Ry. Co.*,

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per Willes J. ((1865) 34 L. J. (C. P.) 292, at pp. 297, 298); *In re Jones*, per Jessel M.R. (18 Ch. D. at p. 118); Dicey on Parties, p. 284; Bullen and Leake's Precedents of Pleadings, 3rd ed., p. 605. Further, under the statute the principle, which at common law relieved an infant from liability for a tort directly connected with a voidable contract, namely, that it was impossible to enforce in a roundabout way an unenforceable contract, equally forbids Courts of law to allow, under the name of an implied contract or in the form of an action quasi ex contractu, a proceeding to enforce part of a contract, which the statute declares to be wholly void. This has been recently illustrated in the closely analogous case of a claim on the footing of money had and received for moneys paid but irrecoverable under what in law was a lending and borrowing ultra vires: *Sinclair* v. *Brougham* ([1914] A. C. 398).

The ground on which Horridge J. held the appellant liable was that by reason of his fraud he was compellable in equity to repay the money, actually received and professedly borrowed, and compellable too by a judgment in personam for the amount, not by any mere proprietary remedy. The rule in equity has been so stated at times by text-writers, both remote and recent (Fonblanque's Equity, 1820, 5th ed., i. 77; Roscoe's Nisi Prius, 16th ed., 642; Wace on Bankruptcy, ed. 1904, p. 6), but of authority for it there is very little. *Esron* v. *Nicholas* (2 Eq. Cas. Abr. 488), a decision of Lord King's, was much relied upon. He is reported to have said 'infants have no privilege to cheat men,' a wholesome truth indeed, but I should hardly call it a principle. The case was examined by Knight Bruce V.-C. in *Stikeman* v. *Dawson* (1 De G. & Sm. 90), who concluded that the facts as reported do not support the decree as made. He procured the note in the registrar's book and found it impracticable to appreciate the decision without knowing the evidence and the pleadings in full, and these unfortunately are not forthcoming. It is a case in which an infant stood by (apparently without actual fraud) while his guardian, or a person purporting to be his guardian, granted a lease. He received or took the benefit of the fine, but when he came of age he repudiated the lease. In a suit to compel him either to grant the plaintiff a new lease or refund the fine, the decree was that, if he did not grant the lease, he should pay back the fine. This seems to be the converse of a line of decisions,

both at law and in equity, the gist of which is that a person who takes and keeps property cannot rely on infancy to release him from its burdens, especially if sued when of age, as in some instances was the case: see Year Book, 2 Hen. 6, 318; *Kirton* v. *Elliott* ((1613) 2 Bulst. 69); *Earl of Buckinghamshire* v. *Drury* ((1761) 2 Eden, 61); *Evelyn* v. *Chichester* ((1765) 3 Burr. 1717); *Lemprière* v. *Lange* ((1879) 12 Ch. D. 675); whatever may be thought of some of these decisions, they do not touch the present case. There is a long gap in the cases relied on after *Esron* v. *Nicholas* (2 Eq. Cas. Abr. 488).

For a very long time and in many forms equity has interfered to give relief against frauds committed by infants, or has refused it to infants guilty of fraud; but the practice and even the principles applicable to such cases were long ill-defined. 'An infant,' says Knight Bruce V.-C. in *Stikeman* v. *Dawson* (1 De G. & Sm. 90), 'however generally for his own sake protected by an incapacity to bind himself by contracts, may be doli capax in a civil sense and for civil purposes in the view of a Court of Equity, though perhaps only when pubertati proximus or older . . . and may therefore commit a fraud for which or the consequences of which he may after his majority be made civilly liable in equity. . . . I agree . . . that in what cases in particular a Court of Equity will thus exert itself it is not easy to determine.' Though many cases have been decided on this subject, none has been cited to us till one in last year in which the decision has directly been that the defendant must pay back under a judgment purely in personam a sum equal to that which he obtained during infancy under a purported contract of lending and borrowing, which was entered into by the lender on the faith of the borrower's fraudulent assertion that he was of full age.

There are, however, some dicta of importance and some decisions which are alleged to bear indirectly on the point. In *Nelson* v. *Stocker* (4 De G. & J. at p. 464) Turner L.J. says: 'if the case had depended simply upon the point of the defendant having represented himself to be of age, when he was not of age, I should have felt no doubt about it. . . . Infants are no more entitled than adults are to gain benefit to themselves by fraud, and had the case therefore depended upon this point alone I should have agreed most fully with the decision of the Vice-Chancellor,'

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which was that the defendant should be decreed to pay 1000*l.* under his covenant, made when an infant, to place that sum in the hands of trustees, contained in a marriage settlement executed by him and by other parties after he had fraudulently represented himself to be of full age. As, however, the party to the settlement who was most concerned, namely, the infant's wife, knew the truth, the Lords Justices allowed the appeal. It will be seen that the actual decision in *Nelson* v. *Stocker* (4 De G. & J. 458) does not touch the present case, nor does the dictum, if its principle be estoppel after majority against denying the truth of a statement made when under age, as explained by Sir Ford North in *Mohori Bibee* v. *Dhurmodas Ghose* ((1903) L. R. 30 Ind. Ap. at p. 122); and see *Wright* v. *Snowe* ((1848) 2 De G. & Sm. 321). The observations of the Court of Appeal in *Levene* v. *Brougham* (25 Times L. R. 265) that there could be no such estoppel were made apparently without citation of any of these cases, but in such a case the Infants' Relief Act would be an answer to estoppel now.

Much reliance was placed on *In re King, Ex parte Unity Joint Stock Mutual Banking Association* (3 De G. & J. 63), with which should be read the comments on it by Bacon V.-C. in *Ex parte Jones* (18 Ch. D. at p. 115) (which are in point though his actual decision was overruled) and by Baggallay L.J. at p. 123. In that case the debtor King, while under age, had obtained advances from the association by a fraudulent misrepresentation that he was of full age. He was adjudicated bankrupt after he came of age and the association was admitted to prove in the bankruptcy for the amount advanced. The Lords Justices arrived at this conclusion somewhat reluctantly on the authority of uncited decisions of Lord Cowper, Lord Hardwicke, and Lord Thurlow. Lord Cowper's case is probably *Watts* v. *Creswell* (9 Vin. Abr. tit. Enfant, N., pl. 24, p. 415), in which he says that if an infant was old enough and cunning enough to carry on a fraud he ought in a Court of Equity to make satisfaction for it. Lord Hardwicke's opinion may be that in *Earl of Buckinghamshire* v. *Drury* (2 Eden, at p. 71)—' minors are not allowed to take advantage of infancy to support a fraud,' against which should be set Lord Mansfield's more particular statement in the same case at p. 72, that if the infant took an estate and was to pay rent for it, he should not hold the estate and defend himself against payment of the rent

by pretence of infancy. The allusion to Lord Thurlow probably is to the case of *Beckett* v. *Cordley* ((1784) 1 Bro. C. C. 358), where he said, ' if there was fraud of which the infant was cognisant, she would be bound as much as an adult.' If these be the authorities relied on in *In re King, Ex parte Unity Joint Stock Mutual Banking Association* (3 De G. & J. 63), and I can find none nearer, they hardly touch the decision in that case, nor do they, or the decision itself in *In re King* (3 De G. & J. 63), affect the case now before us. There, the bankruptcy standing unchallenged and the question being how the assets should be administered among competing creditors or claimants, it was held that persons who had been defrauded by the bankrupt when under age and thereby induced to lend him money had a claim on his assets, not against him personally, which was available in competition with creditors in the full sense of the word. It is clear that Jessel M.R. thought the decision anomalous and one not to be extended : see *Ex parte Jones* (18 Ch. D. at pp. 120, 121). Since then it has been decided in *Reg.* v. *Wilson* ((1879) 5 Q. B. D. 28) that an infant cannot be convicted, under s. 12 of the Debtors Act, 1869, of quitting the country fraudulently with property that ought to be divided among his creditors, since in law he has none. Whatever may be said of *In re King* (3 De G. & J. 63) now, it does not govern the present case, but it must be admitted that the language of the Lords Justices is hardly consistent with any other view than that the bankrupt was in equity personally liable to pay the debt in question. There is further language of a similar kind in *Maclean* v. *Dummett* ((1869) 22 L. T. at p. 711), where the Privy Council speaks of an infant as ' contracting debts ' in his trade by fraudulently asserting himself to be of full age, but this again was not necessary to the decision. These seem to be all the material dicta.

As to the cases, *Clarke* v. *Cobley* ((1789) 2 Cox, 173) is one in which the Court restored the status quo affected by an infant's fraud by ordering him to return promissory notes, the surrender of which he had procured by falsely stating that he was of age, and by putting him under terms not to plead the Statute of Limitations if sued upon them, but a decree against him to pay the amount of the notes, though he was now of age, was expressly refused. In *Cory* v. *Gertcken* ((1816) 2 Madd. 40), where Sir T. Plumer says ' though in general a payment to an infant may be

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bad, yet if the infant practises a fraud he is liable for the consequences,' he only decided that a person could not make his trustee pay over again a sum that he had got from him by fraudulently representing himself, while still an infant, to be already of full age, and in *Chubb* v. *Griffiths* ((1865) 35 Beav. 127) Lord Romilly M.R., when saddling an infant defendant with costs who had been passing off his safes as Chubb's safes, says that he does so on the principle laid down in *Cory* v. *Gertcken* ' ((1816) 2 Madd. 40). What he conceived this principle to be I can hardly tell, but at any rate it is not a general liability in equity for fraud. Jessel M.R. in *In re Jones* (18 Ch. D. at p. 118) regards *Cory* v. *Gertcken* ((1816) 2 Madd. 40) as a pure action of tort. The grounds of an infant defendant's liability for costs were again discussed in *Woolff* v. *Woolff* ([1899] 1 Ch. 343), another case of similar dishonesty, and the liability was rested on the above principle and authority, also without any hint of a wider one that in equity an infant is generally liable for fraud. I think that the whole current of decisions down to 1913, apart from dicta which are inconclusive, went to shew that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant, even by means of a fraud. This applies even to *In re King, Ex parte Unity Joint Stock Mutual Banking Association* (3 De G. & J. 63). Restitution stopped where repayment began; as Kindersley V.-C. puts it in *Vaughan* v. *Vanderstegen* ((1854) 2 Drew. 363), an analogous case, ' you take the property to day the debt.'

Last year, in *Stocks* v. *Wilson* ([1913] 2 K. B. 235), an infant, who had obtained furniture from the plaintiff by falsely stating that he was of age and had sold part of it for 30*l.*, was personally adjudged by Lush J. to pay this 30*l.* as part of the relief granted to the plaintiff. This is the case which more than any other influenced Horridge J. in the Court below. I think it is plain that Lush J. conceived himself to be merely applying the equitable principle of restitution. The form of the claim was that, by way of equitable relief, the infant should be ordered to pay the reasonable value of the goods, which he could not restore because he had

sold them. The argument was that equity would not allow him to keep the goods and not pay for them, that if he kept the property he must discharge the burthen, and that he could not better his position by having put it out of his power to give up the property. Lush J. expressly says ([1913] 2 K. B. at p. 247) 'it is a jurisdiction to compel the infant to make satisfaction,' and, at p. 246, 'the remedy is not on the contract.' At pp. 242–243 he says 'what the Court of Equity has done in cases of this kind is to prevent the infant from retaining the benefit of what he has obtained by reason of his fraud. It has done no more than this, and this is a very different thing from making him liable to pay damages and compensation for the loss of the other party's bargain. If the infant has obtained property by fraud he can be compelled to restore it'; but now comes the proposition, which applies to the present case and is open to challenge, 'if he has obtained money he can be compelled to refund it.' The learned judge thought that the fundamental principle in *In re King, Ex parte Unity Joint Stock Mutual Banking Association* (3 De G. & J. 63) was a liability to account for the money obtained by the fraudulent representation, and that in the case before him there must be a similar liability to account for the proceeds of the sale of the goods obtained by this fraud. If this be his ratio decidendi, though I have difficulty in seeing what liability to account there can be (and certainly none is named in *In re King, Ex parte Unity Joint Stock Mutual Banking Association* (3 De G. & J. 63)), the decision in *Stocks* v. *Wilson* ([1913] 2 K. B. 235) is distinguishable from the present case and is independent of the above dictum, and I need express no opinion about it. In the present case there is clearly no accounting. There is no fiduciary relation: the money was paid over in order to be used as the defendant's own and he has so used it and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of law would have done so, and

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I think that no ground can be found for the present judgment, which would be an answer to the Infants' Relief Act.

Accordingly the appeal succeeds; the judgment must be set aside and entered for the defendant. He will have the costs here, where he succeeds, and of the further consideration below, where he ought to have succeeded. Further than this there should be no costs given him. He cannot be made to pay the costs of the action, in which he was entitled to judgment, but I think that, as he was charged with fraud and found guilty of it, he must pay the costs of that issue, to be set off against such costs as he gets, and as to any other general costs of the action, which must be small, I think there is good ground for saying that there be no order for payment on either side.

Kennedy, L.J. and A. T. Lawrence, J. delivered judgments to the same effect.

Appeal allowed.

'This (*Sutton's Hospital Case* (1613) 10 Rep. 1 *a*) seems to me an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own. And further, that an attempt to forbid this on the part of the King, even by express negative words, does not bind at law. Nor am I aware of any authority in conflict with this case.

If there are conditions contained in the charter that the corporation shall not do particular things, and these things are nevertheless done, it gives ground for a proceeding by scire facias in the name of the Crown to repeal the letters patent creating the corporation: see *Reg.* v. *Eastern Archipelago Company* (1853) 2 E. & B. 857. But if the Crown take no such steps, it does not, as I conceive, lie in the mouth either of the corporation, or of the person who has contracted with it, to say that the contract into which they have entered was void as beyond the capacity of the corporation.'—Per Blackburn, J., in *Riche* v. *Ashbury Railway Carriage Company* (1874) L. R. 9 Ex. at p. 263.

'It is a broad and general principle that companies incorporated by statute for special purposes, and societies, whether incorporated or not, which owe their constitution and their status to an Act of Parliament, having their objects and powers defined thereby, cannot apply their funds to any purpose foreign to the purposes for which they were established, or embark on any undertaking in which they were not intended by Parliament to be concerned.'—Per Lord Macnaghten in *Amalgamated Society of Railway Servants* v. *Osborne* [1910] A. C. at p. 94.

BARONESS WENLOCK *v.* RIVER DEE COMPANY (1883) 36 Ch. D. 675 n.

[THE case was affirmed by the House of Lords (1885) 10 App. Cas. 354.]

[The facts are taken from the report of the case in the House of Lords.]

The action was brought by the appellants [plaintiffs] as executors of the late Lord Wenlock deceased to recover a sum of £173,062 11*s.* 11*d.* with interest, alleged to be due from the respondent [defendant] company in respect of moneys lent to them at various dates between 1870 and 1878 by the late Lord

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Wenlock, and secured by certain indentures by which the respondents [defendants] covenanted to repay the same with interest.

The respondents [defendants] denied that the moneys were received by the company or borrowed for or applied in payment of any debts of or otherwise used for the purposes of the company, and alleged that at the dates of the several indentures they had no power to borrow, or to bind themselves to pay the moneys thereby expressed to be secured, except to the extent authorized by the local Acts hereafter mentioned.

Huddleston B. gave judgment for the plaintiffs for the whole amount claimed, being of opinion that though the borrowing was ultra vires the company had had the benefit of the moneys and had applied them to the purposes of the company. [From this judgment the defendants appealed.] At the hearing before the Court of Appeal the company admitted the claim of the plaintiffs to the extent of £25,000, and such further sum as they could shew had been applied in payment or discharge of any debts or liabilities of the company.

By 6 Geo. 2 c. 30 (public Act) Nathaniel Kinderly, his heirs and assigns, and such persons as he, his heirs and assigns, should nominate and appoint under seal, were appointed undertakers of the navigation of the River Dee and were empowered to make and keep the river navigable, and to take and receive certain duties and tonnages.

Nathaniel Kinderly nominated certain persons, who agreed to raise a joint-stock capital of £40,000, and these persons were incorporated by an Act 14 Geo. 2 c. 8 (public Act). Further powers were conferred upon the company by 26 Geo. 2 c. 35 (public Act) and 31 Geo. 3 c. 88 (public Act).

None of these Acts expressly authorized or forbade the company to borrow.

By 14 & 15 Vict. c. lxxxvii. s. 24, the company was authorized to borrow two several sums of £25,000 for the purposes and under the conditions therein mentioned.

By 31 Vict. c. xxv. (local Act) a conditional power was given to raise additional capital, and to borrow on mortgage a further sum of £25,000, but this power was never exercised.

The company expended large sums in and about the improve-

ment of the navigation of the River Dee, and reclaimed a large tract of land of considerable value.

In 1873 Lord Wenlock advanced £85,000 to the company upon a mortgage of lands belonging to them, with the concurrence of all the then stockholders, and in December of the same year he advanced a further sum of £8000 upon a deed of further charge upon the same lands of the company, which was also assented to by all the then stockholders. In June 1878 a mortgage upon lands of the company for £60,000 to the trustees of the Rock Life Assurance Company (dated the 22nd of June 1870 and agreed to by all the then stockholders) was transferred to Lord Wenlock. He died in November 1880, and this action was brought to recover the sums included in these three indentures of mortgage, with arrears of interest.

BOWEN, L.J.—I am of opinion with the remainder of the Court that the *River Dee Company* had no power to enter into the contract upon which they were sued. Beyond that, we decide by our judgment that the Plaintiffs are entitled to the equitable doctrine set forth in *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.*,[1] and we further reserve them all rights they may have, if any, to any equities they may establish outside that. The only matter upon which I propose to add any words is the question of law relating to the construction of the statute and the suggested power of the *River Dee Company* to enter into the contracts sued upon. The contracts sued upon are covenants for the repayment of the money purported to be secured by mortgage of the company's lands. The company was incorporated by the Act of 14 Geo. 2, and the sole question—at least I think the sole question—is whether under that Act the corporation was clothed with the power of borrowing money and binding itself to repay the money; or if it was so clothed, whether such powers have been taken away by the later Acts.

[1] (1882) 22 Ch. D. 61. The equitable doctrine referred to is explained by the following passage from the judgment of Lord Esher, M.R., at p. 678 of the present case: 'I shall not pretend to go further with regard to the equitable right than to say that if any of the money borrowed in this way from Lord Wenlock has been expended in paying proper debts of the company, then, although those who received the money from Lord Wenlock were not authorized to bind the company, yet Lord Wenlock's representatives may in equity recover from the company so much of that money as was expended in paying debts of the company.' [Edd.]

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Bowen, L.J.

Now, Mr. *Rigby* (counsel for the plaintiffs) has presented for our consideration this sort of canon of construction of the statute. He said that when there is a statute which incorporates a company, you ought, if you want to know whether the company can borrow money, to approach the statute assuming that the company can borrow money, unless the power is taken away expressly or by implication. I confess that I do not think that that is the true canon of construction, though I admit that far greater men have appeared to think it was. Of course one can only go by the light of one's own reason, and I propose to consider these statutes from a slightly different point of view, although I do not think my view makes very much difference. I wish, however, to explain the way in which I travel towards the consideration of them.

At common law a corporation created by the King's charter has, *primâ facie*, and has been known to have ever since *Sutton's Hospital Case* (10 Rep. 13), the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to; and even if by the charter creating the corporation the King imposes some direction which would have the effect of limiting the natural capacity of the body of which he is speaking, the common law has always held that the direction of the King might be enforced through the Attorney-General; but although it might contain an essential part of the so-called bargain between the Crown and the corporation, that did not at law destroy the legal power of the body which the King had created. When you come to corporations created by statute, the question seems to me entirely different, and I do not think it is quite satisfactory to say that you must take the statute as if it had created a corporation at common law, and then see whether it took away any of the incidents of a corporation at common law, because that begs the question, and it not only begs the question, but it states what is an untruth, namely, that the statute does create a corporation at common law. It does nothing of the sort. It creates a statutory corporation, which may or may not be meant to possess all or more or less of the qualities with which a corporation at common law is endowed. Therefore, to say that you must assume that it has got everything which it would have

at common law unless the statute takes it away is, I think, to travel on a wrong line of thought. What you have to do is to find out what this statutory creature is and what it is meant to do; and to find out what this statutory creature is you must look at the statute only, because there, and there alone, is found the definition of this new creature. It is no use to consider the question of whether you are going to classify it under the head of common law corporations. Looking at this statutory creature one has to find out what are its powers, what is its vitality, what it can do. It is made up of persons who can act within certain limits, but in order to ascertain what are the limits, we must look to the statute. The corporation cannot go beyond the statute, for the best of all reasons, that it is a simple statutory creature, and if you look at the case in that way you will see that the legal consequences are exactly the same as if you treat it as having certain powers given to it by statute, and being prohibited from using certain other powers which it otherwise might have had. There are two questions, first whether a statutory corporation can borrow, and, secondly, whether if it cannot, its professed acts of borrowing can be ratified by consent of all the members of the corporation. Now, assuming that it is not a creature created with borrowing power, it is obvious that no amount of ratification by the individual members can make good an act which cannot be done; and therefore the same legal result is arrived at, if you consider the case from that point of view, as if you said that the shareholders were attempting to do an act which was prohibited. The real truth is, they are trying to ratify what cannot be ratified, because they are trying to ratify an act which the corporation is not in any view clothed with capacity to do. I therefore approach this case with a desire to find out what is this creature. Was it meant to borrow or was it not meant to borrow?

Before I go to the statutes I should like to add that it seems to me that the right test of construction, at all events with regard to this contract of Lord *Wenlock's*, is laid down by the Lord Chancellor in *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.* (22 Ch. D. 70). He says: 'There is also no doubt, that where there is not an express prohibition against borrowing in the case of a company or a society constituted for special purposes, no

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borrowing can be permitted without express authority, unless it be properly incident to the course and conduct of the business for its proper purposes.' That seems to me to be putting into a nutshell and into very clear language exactly the test which would follow the course of thought I have been pursuing, and that it is the test which we must apply here. Applying it (I am not going through the history of the company or through the history of the statutes again), I agree with what the Master of the Rolls and Lord Justice *Cotton* have said. I find in the first place that lands have been vested in this company and in its assigns. White-sands and large tracts of land were to become theirs, and they were to have the profits which they could make by farming these lands for their use and purposes. The company were to make good certain liabilities in which the Act involved them as respects neighbouring proprietors, and as respects the navigation of the *River Dee*, and a body of Commissioners was created with power of entering upon the lands for the purpose of enforcing the due fulfilment by the company of those obligations; and lastly, in the Act of incorporation there was a provision by which the company was to be prevented, or rather its shareholders were to be prevented, from parting with any of their shares until the river was made navigable. The second Act followed a few years afterwards, no doubt after a certain portion of work had been done by the company, and the second Act and the first Act together shew that for the purpose of financing the adventure the corporation had conferred upon them the following sources of profit. In the first place they had their own capital, and in the second place they had reclaimed lands which they could utilise and lease and farm. I agree with Lord Justice *Cotton* in what he has said as to entertaining considerable doubt whether the company could sell any of those *River Dee* lands except a certain portion which is specified in schedule 3 of the Act of 14 Geo. 2. If that is the true view (I do not think it is necessary actually to decide the question) it would lead me to suppose that if they could not sell them they could not mortgage them, but they could not at all events sell the great body of the reclaimed lands. They had power of selling a portion, and they had power of making a further call, and there was no express power of borrowing given. Now I admit that it is not very clear

by express enactment, and it is not very clear on the construction of these Acts that the company had not got implicit power of borrowing for purposes which were necessary and proper for carrying on their business. I do not mean to say that it is absolutely clear that they had not got a general borrowing power, but I think that if it stood simply upon these first two Acts I should come to the conclusion that they had not got a general borrowing power, or, at all events, any power of borrowing beyond what was actually necessary for carrying on their business. If the present loan is certainly not a loan which it was necessary for the company to take for the purpose of carrying on their business, then, unless they had a general borrowing power they cannot pray in aid any limited borrowing power that they had by implication on the construction of the first Act. I confess that my judgment, if it stood on the Acts alone, would be that if they had not such power it was not any way to be seen within the ambit of these Acts that the Legislature intended them to become a borrowing body. They have other means of providing themselves with funds, and I think that this becomes clearer from the later Acts, and that those later Acts are valuable for the purposes of the construction of the earlier Acts. When you have ambiguous Acts of Parliament it is an established maxim of construction that you can go to the use which has been made under the Acts of Parliament which you are interpreting by persons who are bound to obey them, with the view of finding out on which side the balance ought to descend. Now, we have with regard to these earlier Acts of Parliament this; in the first place, as far as we can learn there has never been a single attempt made under them to exercise any borrowing power; that is significant. Secondly, we have in the later Act a recital by the body itself, to my mind a recital amounting to this, that they had not got it. To my mind they say so not very clearly, but nevertheless they do say so in the preamble of the earlier Act. They say so in express terms in the later Act, and then you find that with those recitals they have obtained from Parliament a limited power of borrowing. Now I do not say that if they had previously a common law power of contracting, this limited power of borrowing on mortgage which was contained in the later Acts would take it away, but I do say that the action of the Legislature in 1851,

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put in motion as the Legislature was by the *River Dee Company* itself, and the declarations contained in the preamble to the Act itself, which are in fact propositions put forward for the consideration of Parliament by the *River Dee Company* itself, do throw a conclusive light upon the earlier statutes and compel me to arrive without any real doubt at the conclusion that on the true construction the *River Dee Company* down to the Act of *Victoria* was not a corporation which had a general power of borrowing.

LORD ESHER, M.R. and COTTON, L.J. delivered judgments to the same effect.

[Judgment for the plaintiffs for £25,000, with interest, and in addition for so much only of the sums advanced as was employed in payment of any debts or liabilities of the company properly payable by them, with interest; the amounts to be inquired into by a special referee. The judgment to be without prejudice to any action the plaintiffs might be advised to bring for enforcing any equities against the stock or shares of the company, or otherwise not expressly adjudicated upon thereby].

'In fact the judgment is obtained against the married woman, but it is not executed in the ordinary way; execution issues upon it against the only portion of her property which can be got at, her separate estate not specially protected, for the restraint on anticipation operates as long as her husband is alive. It is not true therefore to say that the judgment is not a judgment against her.'—Per Lindley, L.J., in *Holiby* v. *Hodgson* (1889) 24 Q. B. D. at p. 108.

SCOTT *v.* MORLEY (1887) 20 Q. B. D. 120

APPEAL by Julia Morley, the wife of Samuel Morley, against an order made by Kekewich, J., sitting as vacation judge, upon a judgment summons, that she should be committed to prison for six weeks for non-payment of 291*l.* 11*s.* 9*d.*, the amount of the plaintiff's judgment debt and costs.

The action was brought in the Queen's Bench Division against Samuel Morley and Julia Morley, his wife, by a creditor of the wife in respect of a debt contracted by her while she was a married woman. The writ was not served on the husband. The wife appeared to the writ, and on April 7, 1886, an order was made in chambers giving the plaintiff leave to sign judgment under Order XIV. r. 1, for the amount indorsed on the writ, with interest and costs, unless the amount of the plaintiff's claim should be paid into Court on or before the 15th of April, 1887, or security given within that time. The order directed that execution should be limited to the separate estate of the wife not subject to any restraint on anticipation, unless, by reason of s. 19 of the Married Women's Property Act, 1882, such estate should be liable to execution notwithstanding such restraint.

The wife did not within the time limited either pay the amount into Court or give security for the same, and the plaintiff signed judgment against the defendant for 278*l.* 8*s.* 9*d.*, and 13*l.* 3*s.*, the amount of his taxed costs, making together 291*l.* 11*s.* 9*d.*, execution being limited as above stated.

LORD ESHER, M.R.—I will consider first what was the liability of a married woman before and up to the coming into operation

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of the Married Women's Property Act, 1882. At common law as regarded a contract made by a woman before her marriage, but which was not sued upon till after her marriage, she and her husband were sued together, and, if it was proved that the contract on which the action was brought had been made by the wife before marriage, the judgment went against both husband and wife, and the execution followed the judgment. In those days one mode of execution was by a capias ad satisfaciendum, and the writ went against both husband and wife, so that the wife could be taken in execution to satisfy the judgment. Under certain circumstances—if it was proved that the wife had no separate property—the Court was enabled to deal with a wife in a different way from that in which they dealt with the husband; the Court could not deal with him at all. But the wife was liable to be taken under a capias in respect of a contract entered into by her before marriage. During marriage a woman could not legally enter into any contract, without the authority of her husband, and no action could be maintained upon such a contract against her and her husband. If during marriage she entered into a contract without the authority of her husband there was no remedy in respect of it; if she entered into a contract with his authority it was his contract alone, and he alone could be sued upon it. Again, if a wife during marriage committed certain torts, she could be sued in respect of them jointly with her husband; she could be sued on the ground that she had committed the wrong, and he on the ground that he had permitted her to do so. But the judgment went against both husband and wife, and, as the execution followed the judgment, the wife could be taken under a capias. But at common law, in respect of a contract made by a woman during marriage, there was no remedy; in other words, there was no legal liability upon her. In equity, however, a decree could be obtained upon such a contract, but only when the woman had separate property, and the decree was in the form of a declaration that her separate estate was chargeable with the amount due on the contract. That is to say, in equity the creditor could obtain an order charging the woman's separate estate, but the order did not render her liable to be taken in execution. Therefore, up to the time of the coming into operation of the Married Women's Property Act, 1882, a married

woman could be taken in execution upon a judgment recovered after her marriage against her and her husband in respect of a contract made by her before marriage, and also upon a judgment recovered against her and her husband in respect of a wrongful act done by her during the marriage. But neither at law nor in equity was she liable to be taken in respect of a contract made by her during marriage. It seems to me that the Act of 1882 does not alter the legal liability of a married woman at all. It does not prevent the bringing of an action against a husband and wife in respect of a contract made by the wife before marriage, and it does not affect the case of a wrongful act committed by a woman during marriage, and, where at common law a married woman was liable to be taken under a capias ad satisfaciendum, in such cases she can now be summoned under s. 5 of the Debtors Act, 1869, and be dealt with accordingly.

But then arises the question, what is now the position of a married woman in respect of a liability to which she was not subject at common law, but which has been imposed on her solely by the Married Women's Property Act, 1882? The liability is imposed by sub-s. 2 of s. 1 of that Act, which provides that 'a married woman shall be capable of entering into and rendering herself liable on any contract.'

That must mean that a woman shall after she is, and whilst she is married, be capable of entering into and rendering herself liable upon any contract. She could enter into a contract before the Act, and therefore the Act must mean that she shall be capable of entering into a contract so as to render herself liable upon it. A liability is thus imposed on her which did not exist either at law or in equity before the Act. If sub-s. 2 had stopped there, I should have thought that the same consequences would follow as in the case of a contract entered into by a feme sole. If no remedy were given by the Act for a breach of the contract, the remedy must be that common law remedy which is applicable to the case. But, if a remedy is given by the statute which imposes the new liability, that must be the only remedy. Sub-s. 2 goes on to provide that the woman shall be capable of rendering herself liable 'in respect of and to the extent of her separate property,' and 'of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and

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her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her' (that again alters the law); 'and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.'

That is, the damages recovered are not to be payable by the married woman; they are to be payable out of her separate property. It seems to me that the judgment in such an action ought to follow the words of the Act. The damages to be recovered are to be payable out of the woman's separate property, or they are to be recovered against her, but are to be payable only out of her separate property. This section really imposes a new liability on a married woman at law, which will produce the same result as was before the Act produced in equity. In equity the decree was that the sum found due should be charged on the married woman's separate estate, and the same effect is, as it seems to me, given by the Act to an action at law as was before the Act produced in equity by a different process.

If this be so, does s. 5 of the Debtors Act, 1869, apply to a judgment of this nature? Sect. 5 says that the Court may commit to prison any person who makes default in payment of 'any debt due from him' in pursuance of any order or judgment of the Court. What is the real meaning of those words 'due from him'? It appears to me that they point to a debt which the defendant is personally liable to pay. If you treat the Debtors Act as an Act which authorizes the Court to commit people to prison, then you must construe it strictly. It is a highly penal Act, affecting the liberty of the subject, and you must not say that a sum which is payable only out of a person's property is a sum 'due from' that person. If, on the other hand, you treat the Act as a remedial Act, then it only enables the Court to modify the imprisonment which could have been inflicted at common law, so as to prevent it from being so large as it was at law before the Act; and, treating the Act in that way, s. 5 cannot apply to such a case, because there was nothing to modify, there being no power to arrest a married woman before the Act. If it is treated as a penal Act it must not be stretched. In either view of the Act, it appears to me that s. 5 of the Debtors Act does

not apply to the judgment which can be recovered against a married woman only by virtue of the Married Women's Property Act, 1882. On these grounds I agree with the decision in *Draycott* v. *Harrison* (17 Q. B. D. 147), though not with all the reasons given by the learned judges.

I desire to repeat that our present decision applies merely to judgments which can be recovered against a married woman only by virtue of the Act of 1882, and that it does not apply to judgments which could have been recovered against a married woman at common law before that Act.

The order of Kekewich, J., was wrong, and it must be discharged. But it appears that the question of jurisdiction was not argued before him.

BOWEN, L.J.—I am of the same opinion. I will begin by saying that we are now deciding that a married woman cannot be committed upon a judgment summons under s. 5 of the Debtors Act, 1869, for non-payment of a sum for which judgment has been recovered against her in an action brought strictly under sub-s. 2 of s. 1 of the Married Women's Property Act, 1882. We say nothing as to any other judgments which can be recovered against a married woman. The power of committal given by the Debtors Act is, I do not say equivalent to, but it is more or less a substitute for the old process of capias. Suppose that there had been no Debtors Act, and that the Act of 1882 had been passed enabling a married woman to be sued and judgment to be recovered against her, subject to the limitations contained in sub-s. 2 of s. 1, would a judgment so obtained have justified the arrest of a married woman under a capias? As a general rule a writ of capias followed the judgment; it was the fruit of the judgment. At common law therefore, when a judgment had been regularly obtained against a married woman, a capias could be issued against her on the judgment. It is plain from the cases of *Beynon* v. *Jones* (15 M. & W. 566) and *Newton* v. *Boodle* (9 Q. B. 948) that the capias followed the judgment. And, even in a case in which a married woman could, if she had pleaded coverture, have escaped liability, but she omitted to plead it, or in which, having pleaded coverture, she allowed judgment to go against her by default upon her plea, she could

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not be heard to complain if she was arrested under a capias upon the judgment. A limitation was, however, in the course of time imposed on this somewhat stern view of the liability of a married woman to this extent, that, if she was sued with her husband, and they were both arrested under a capias, and it then appeared that she had no separate property, the Court would as a matter of indulgence discharge her. The cases of *Edwards* v. *Martyn* (17 Q. B. 693) and *Larkin* v. *Marshall* (4 Ex. 804) are authorities for this proposition. But they also shew that at common law a married woman could be taken under a capias upon a judgment recovered against her husband and herself. We must have regard also, in considering this particular part of the argument, to the position of a married woman in equity at the time when the Act of 1882 was passed with respect to engagements into which she had entered. In equity her separate estate could be made available by way of charge to satisfy those engagements.

But it appears to me that, when the Act of 1882 gave to a married woman a legal capacity of entering into contracts, it was intended to limit the extent of her liability upon them, and the question is, to what extent it is limited. Sub-s. 2 of s. 1 says that a married woman shall be capable of 'rendering herself liable in respect of and to the extent of her separate property on any contract.' It appears to me that those words, taken in their natural sense, do not create any personal liability; they only subject the married woman to a proprietary liability. I think that a judgment recovered against a married woman by virtue of those earliest words would not subject her to a personal liability as distinguished from a liability in respect of property. Then sub-s. 2 goes on to say that she shall be capable 'of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant or be made a party to any action or other legal proceeding brought by or taken against her.' This makes a considerable alteration in the mode of legal procedure by or against a married woman. Finally, we come to the result of the suit, that which the plaintiff is to take under his judgment, 'any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.' The only means of satisfaction of the judgment there

indicated are to be found in her property, not in her person. This limited power for a married woman to render herself liable upon a contract, in respect of her separate property, and that only, is the creation of the statute, and, just as sub-s. 2 begins with enabling her to render herself liable in respect of her separate property only, so it ends by saying that the creditor is to obtain satisfaction out of her separate property, and not otherwise. Such a judgment is not like a judgment for a debt at common law, and it seems to me, therefore, that, if the Debtors Act had not been passed, it would not have given the creditor any right to take the woman's body in execution.

Then arises the question, whether, after writs of capias were abolished, s. 5 of the Debtors Act gave the judge power to commit the defendant to prison for her default in paying the judgment debt? Of course the legislature is omnipotent, and might extend in any way the power of committing judgment debtors, though, having regard to the course of modern legislation, it is not likely that it would do so. But it is not unimportant to remember that the Married Women's Property Act, 1882, had not been passed at the time when the Debtors Act was passed, so that there is no ground for supposing that the latter Act was passed with a view to the former, though of course the words of s. 5 of the Debtors Act might be large enough to include judgments against married women under the Act of 1882. What, then, is the language of s. 5? I desire to express my adherence to the large view of the construction of such an Act which has been adopted by the Master of the Rolls. When an Act is dealing with the liberty of the subject we ought to be very careful not to read into it words which are not to be found there, and which would derogate from the liberty of the subject. Now s. 5 gives power to commit a person who makes default in payment of any debt 'due from him.' Can it be said that, when a judgment directs a sum to be paid out of a married woman's separate property, it creates a debt 'due from her,' as to which she can make default in payment? In my opinion, if we were so to hold, we should be straining the language of s. 5. The debt under such a judgment is only 'due from' the married woman sub modo; it is only payable out of her separate property. This is enough to determine the present case.

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I say nothing about judgments which could be recovered against a married woman at common law; I limit my decision to judgments which can only be recovered by virtue of the Act of 1882.

I think that the judgment in the present case has been in substance drawn up with a true view of the effect of sub-s. 2, though I think it is not exactly right in form. In my opinion the judgment ought to follow the words of the Act, and, if my learned colleagues concur with me, I think that this will be a convenient opportunity for us to indicate what would be the right form of the judgment in such a case.

FRY, L.J., delivered judgment to the same effect.

Appeal allowed.

NOTE.—The present form of a judgment against a married woman on a contract made during coverture is based on the form of judgment settled by the Court in *Scott* v. *Morley*, and is as follows:—

'It is this day adjudged that the plaintiff recover against the defendant [*name of married woman*] £—, and costs (to be taxed), such sum and costs to be payable out of the separate property of the said defendant which she is now or may hereafter be possessed of or entitled to, and any property which she may hereafter while discovert be possessed of or entitled to, and not otherwise: Provided that, *unless otherwise ordered*, nothing herein contained shall render available to satisfy this judgment any separate property which at the time of entering into the contract sued on in this action, or thereafter she was or may be restrained from anticipating, unless by reason of section 19 of the Married Women's Property Act, 1882, such property shall be available to satisfy this judgment notwithstanding such restriction.' —R. S. C., Appendix F.

[The words italicized were added in consequence of the provisions introduced by Sect. 12 of the Bankruptcy Act, 1913 (now Sects. 52 and 125 of the Bankruptcy Act, 1914), under which the Court has power, on the application of the trustee in bankruptcy of a married woman, to order the income of separate property subject to a restraint on anticipation to be paid to the trustee for distribution amongst her creditors.]

The effect of the proviso protecting property subject to a restraint on anticipation should be noted. It is based upon the words of Sect. 1 of the Married Women's Property Act, 1893, as interpreted by the Courts in a series of cases of which the most recent is *Wood* v. *Lewis* [1914] 3 K. B. 73. This section, together with other important sections from the Acts, is set out at the end of this note.

There can be no doubt that the proviso places absolutely and for ever

beyond the reach of the judgment creditor the corpus of any property which at the time of the contract the married woman was restrained from anticipating. The restraint may have come to an end, e. g. by the cessation of the coverture, in which case the property would be no longer 'separate' property at all; none the less it does not thereby become available to satisfy the judgment.

The effect upon the income from time to time accruing due on such property is somewhat less certain. On the one hand it is clear that when property is subject to a restraint on anticipation, the income of such property ceases itself to be subject to the restraint at the moment that it becomes due to the married woman whether it has actually been paid over to her, or is still in the hands of a trustee; for the restraint only prevents her from anticipating income which is not yet due, and not from disposing of income which has become due (*Hood Barrs* v. *Heriot* [1896] A. C. 174).

On the other hand it does not follow from this that income, merely because it has accrued due, is available to satisfy an obligation on a contract entered into before it accrued. On principle it would seem that to make such income available must be to allow the married woman to anticipate it, for it must involve that she was able to bind and did in fact bind it by the contract. It is necessary, however, to consider the cases which have dealt with the subject.

On one point the cases all agree. If income has not accrued due at the date of the judgment, it cannot be made available. In *Bolitho* v. *Gidley* [1905] A. C. 98 a bank having recovered judgment against a married woman for the balance of a banking account obtained a garnishee order nisi against her trustees to attach all debts owing or accruing due from them to her. Between the date of the judgment and the garnishee order the trustees had received income of separate property subject to a restraint on anticipation which was not due at the date of judgment, and the bank contended that the trustees were bound to pay over such income. The House of Lords refused to accept this contention; for if this were the law, 'no doubt a married woman restrained from anticipation would still be unable to give a security for advances; but those who had ministered to her extravagance would find a security in a judgment against her of an anticipatory character, swooping down upon her property from time to time as and when received; and so the restraint on anticipation would be of no avail.'—Per Lord Macnaghten.

The difficult case, however, arises where income has accrued due at the date of judgment, which was not due at the date of the contract. This was the case that came before the Court of Appeal for decision in *Wood* v. *Lewis*. The plaintiff brought an action against a married woman on a bill accepted by her in 1909. On December 29, 1913, he signed judgment against her in default of defence in the form set out above. It appeared that a covenantor had by deed covenanted to pay to the defendant Lewis a quarterly sum of £250 to be held by Lewis in trust to pay the same to the married woman for her separate use without power of anticipation. On December 24, 1913, i. e. before the date of judgment, this covenantor had paid Lewis a sum of

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£235 8*s.* 4*d.*, and on December 30, 1913, the plaintiff obtained a garnishee order nisi attaching all debts owing by or accruing due from Lewis to the married woman to answer his judgment against her. On the garnishee order nisi coming on for hearing an issue was directed to be tried upon the question whether this sum of £235 8*s.* 4*d.* was attachable. Channell, J., held that the sum was not available to satisfy the judgment, and his decision was affirmed by the Court of Appeal (Lord Sumner and Lawrence, J.). They held that the case was governed by a previous decision of the Court of Appeal in *Barnett* v. *Howard* [1900] 2 Q. B. 784, in which the Court had decided that the words in the proviso to Sect. 1 of the Married Women's Property Act, 1893, 'at that time or thereafter' mean 'at the time of entering into the contract or at any time afterwards'.

Wood v. *Lewis* therefore would seem to be a clear decision to the effect that the income of separate property subject to a restraint is available to satisfy a judgment against a married woman on her contract only if such income had accrued due to her at the time of the contract, and that it is of no avail merely to show that it had accrued at the date of judgment.

Difficulty, however, is caused by the earlier decision of the House of Lords in *Hood Barrs* v. *Heriot* which has generally been regarded as deciding that, provided income is due at the date of judgment, it is available to the judgment creditor. It is, however, desirable to consider the facts in that case before affirming that the House of Lords intended this result. The question concerned the income of property subject to a restraint at the date of contract. Judgment had been signed, before the passing of the Act of 1893, against a married woman in an action for goods sold and delivered. At the date of the judgment certain income of trust funds settled upon the married woman for her separate use and without power of anticipation had accrued due, but had not been paid over to her by the trustees, and the judgment creditor obtained orders (from Day, J.) appointing a receiver of this income. The Court of Appeal discharged these orders (*Loftus* v. *Heriot* [1895] 2 Q. B. 212), on the ground that the restraint on anticipation continued until the money had actually come to the hands of the married woman. The House of Lords reversed the Court of Appeal, and restored the orders discharged by them. Two distinct questions of law appear to arise on these facts:— (1) Is the income of property subject to a restraint which has become payable but not been actually paid to a married woman itself subject to the restraint? The Court of Appeal had held that it was. The House of Lords held that the restraint ceased when it accrued due to her. This is the only question which is discussed or expressly decided in the speeches delivered in the House of Lords. (2) If such income is no longer subject to the restraint, is it also available to satisfy a judgment on a contract entered into before it had accrued, and when it was still subject to the restraint? The Court of Appeal having decided that the restraint was continuing at the date of judgment, it was unnecessary for them to consider this second question. But on the view of the first question taken by the House of Lords, the second question obviously does arise. Did the House intend to decide it in the affirmative?

It is submitted that the point was never before the House at all. In the first place, the date of the contract does not appear from the reports, although presumably it was made before the income in question had accrued. But the following consideration is more important. The Court of Appeal, when they discharged the orders of Day, J., had refused a stay of execution, and the arrears of income had accordingly been paid over to the married woman before the appeal to the House of Lords was heard. When therefore those orders were restored by the House, there was in fact nothing left for them to operate upon (see per Lord Herschell, L.C., at p. 181, and per Lord Macnaghten at p. 186); and Lord Macnaghten expressly reserved any question of the form or extent of the order for future consideration (ibid.). It is submitted therefore that the House never expressly decided this second point, as in fact it had then become immaterial. If, however, the House did decide this point, the decision in *Wood* v. *Lewis* can only stand by assuming, as indeed seems to be suggested by Lord Sumner, that the law has been altered by the proviso to Sect. 1 of the Act of 1893. [Edd.]

The Married Women's Property Act, 1882

Sec. 1. (1) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages and costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

Sec. 13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into and all wrongs committed by her before her marriage . . .; and she may be sued for any such debt or for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts or wrongs, and for all damages and costs recovered in respect thereof; . . .

Sec. 14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, . . . to the extent of all property whatsoever belonging to his wife

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which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been bonâ fide recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; . . .

Sec. 15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him, or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

Sec. 19. Nothing in this Act contained . . . shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage . . .

Married Women's Property Act, 1893.

Sec. 1. Every contract hereafter entered into by a married woman, otherwise than as agent,

(*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

(*b*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

'In no case and by no device whatever can the restraint upon anticipation be evaded.'—Per Malins, V.C., in *Stanley* v. *Stanley* (1878) 7 Ch. D. at p. 591.

LADY BATEMAN *v.* FABER [1898] 1 Ch. 144

LINDLEY, M.R.—This case is somewhat new in its details, and it is of great importance, both to lawyers and socially. But, in my opinion, it is impossible for us to reverse the decision of Kekewich J. unless we are prepared to say that it is competent for a married woman, who is entitled to property for her separate use without power of anticipation, to get rid of the restraint by telling an untruth, and procuring some third person to act on the faith of that untruth. I do not say that the law would be unreasonable if that proposition were well founded, but I dare not say it is law in the face of some well-known authorities which say that it is not.

The question arises in this way. The plaintiff, Lady Bateman, was entitled to property, which I will call the Kelmarsh estates, for her life, for her separate use without power of anticipation. The settlement which created that interest contained a proviso, that, if at any time she should succeed to an income in her own right of 8000*l.* or more per annum for her separate use, then the previous trust for her benefit should cease. Now, whether this trust has or has not ceased or determined depends upon this simple question of fact: Has she or has she not succeeded to an income in her own right of 8000*l.* a year? If she has, then the Kelmarsh estates have ceased to belong to her for her life; if she has not, then those estates still continue to be hers. I entirely agree with Mr. Renshaw that this is a mere question of fact.

What is the evidence before us? The evidence is, a deed-poll executed by the plaintiff in which she states that she has succeeded to an income in her own right of 8000*l.* a year. The first question which arises is, whether that deed is admissible in evidence against her. I think it plainly is. There is no objection to it, and it amounts to an admission by her that this event has happened. But she says, 'I made a mistake. I made that admission by inadvertence, and I now claim relief upon the ground of that mistake.' The answer of the defendant Faber to that is, 'You are not entitled to say your admission was made under a mistake or was untrue, because you made it with a view

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to induce—and you did induce—Mr. Montagu to act upon it, and to change his position by reason of it. I do not care whether your statement was true or untrue. You said you had succeeded to an income of 8000*l.* a year, in order to induce him to make arrangements with your husband which he would not otherwise have made, and he made them, and therefore you are estopped from denying the truth of your statement.'

Now, no doubt, as regards any one but a married woman who is entitled to property for her separate use without power of anticipation, that would be a good answer. But, if we admit it to be a good answer to this plaintiff, what are we doing but enabling her by telling an untruth to deprive herself of that protection which the restraint on anticipation was designed to afford to her? In my opinion, that cannot be done. I entirely agree with the learned judge below. I do not think it necessary to go through the cases: none of them exactly touches the present case. It is new in point of detail, but in principle it is old. A married woman cannot by hook or by crook—by any device, even by her own fraud (the cases go that length)—deprive herself of the protection which the restraint on anticipation throws around her. About the policy of the law I will say nothing, but it has been sanctioned by the Married Women's Property Act.

The result is that a married woman, having an estate for her separate use without power of anticipation, can play fast and loose to a greater extent than if she were a feme sole. The appeal must be dismissed with costs.

CHITTY and VAUGHAN WILLIAMS, L.JJ. delivered judgments to the same effect.

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'The only question, as it seems to me, is whether the contract was entered into by the lady "otherwise than as agent". That is a question of fact. Unless the affirmative is shewn the Act does not apply.'—Per Lord Macnaghten in *Paquin, Limited* v. *Beauclerk* at p. 164.

PAQUIN, LIMITED *v.* BEAUCLERK [1906] A. C. 148

The respondent in 1902 and 1903, while living with her husband, Mr. Holden, bought wearing apparel from the appellants under the circumstances related in the judgments of Lord Loreburn L.C.

and Lord Macnaghten. The appellants having brought an action against the respondent to recover 245*l.* for the apparel, the jury were unable to agree, and Lawrence J. entered judgment for the plaintiffs for that amount. The Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.) reversed this decision, and entered judgment for the defendant. Hence the present appeal.

Isaacs, K.C., and *Lush, K.C.* (*Groser* with them), for the appellants.

The respondent ordered the goods in her own name and for her own personal use. There was no evidence that she was contracting for her husband, or even that the appellants knew that she was a married woman. The Married Women's Property Act, 1893, has removed difficulties out of the way of creditors. Under the Act of 1882 it was necessary, in order to create liability, that the married woman should have separate property at the time the contract was made: *Palliser* v. *Gurney* ((1887) 19 Q. B. D. 519); *Stogdon* v. *Lee* ([1891] 1 Q. B. 661). For the form of a judgment against the separate property see *Scott* v. *Morley* ((1887) 20 Q. B. D. 120, 132). Now, by the Act of 1893 the liability attaches to future separate property, though the married woman had none at the date of the contract; secondly, the burden of proof is shifted. The Act of 1893, s. 1, provides: 'Every contract hereafter entered into by a married woman, otherwise than as agent,' is to bind her separate property present or future. The words 'otherwise than as agent' shew that agency must be proved in order to escape liability. The Court of Appeal assumed that agency must be inferred where husband and wife are living together. The respondent certainly did not purport to act as her husband's agent. She gave her own name and paid with her own cheques. The title 'Mrs.' proved nothing—she might have been a widow, or a spinster, for all the appellants knew. Exclusive credit was given to the respondent, and there was no evidence of the husband's authority. If the respondent was an agent, she was so for an undisclosed principal, and is therefore personally liable. In this view judgment should be entered for the appellants. Failing that, the appellants are entitled to the verdict of a jury on the questions whether the appellants knew she was married and cohabiting with her husband, and had his authority to pledge his credit; and whether he

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approved of her buying those clothes. Upon these questions the Court of Appeal were not warranted in assuming the function of a jury. There ought, therefore, to be a new trial. The appellants could not sue the husband; he had supplied his wife with large sums to pay for her clothes, and she had no authority to pledge his credit: see *Debenham* v. *Mellon* ((1880) 5 Q. B. D. 394; 6 App. Cas 24, 31, 36). There the husband made the wife an allowance, and it was held in this House that the mere fact of marriage and cohabitation did not raise the presumption of agency. Here the Court of Appeal acted merely on that presumption. In *Morel* v. *Earl of Westmorland* ([1904] A. C. 11), where the husband gave his wife an allowance, Lord Halsbury L.C. said that the plaintiffs 'might have sued either the agent or the principal.'

Bankes, K.C., and *Norman Craig*, for the respondent.

Isaacs, K.C., in reply.

The House took time for consideration.

LORD LOREBURN, L.C.—My Lords, this is an action brought by a firm of dressmakers against a lady, who at all material times was a married woman living with her husband, to recover the price of certain articles of dress. The articles were ordered in the months of April, May and June of 1903. When their dealings commenced nothing was said on either side to indicate upon whose credit they were to be supplied, whether that of the husband or of the wife. The plaintiffs debited the lady in the name of Mrs. E. Holden, evidently a mistake for Mrs. V. Holden, and were paid by her cheque for such goods as were paid for. They have never claimed against the husband. It is their custom to debit the lady who gives an order and to ask no questions. They are entitled to carry on their business in this way, but if they do so they must take their chance of the status of those with whom they deal, and of the consequences which the law affixes to that status.

It will be convenient to state first what I understand to be the law applicable to the present case. At common law the general rule, with exceptions not relevant to the present purpose, is that a married woman is incapable of contracting on her own

account and cannot be sued alone. But she might contract as agent for her husband. In equity a married woman possessed at the time of separate estate not subject to restraint against anticipation (I will call it free separate estate) could make contracts enforceable against her separate estate, but not enforceable against herself personally. Such being the state of law and equity, it is manifest that the present plaintiffs could not, apart from statute, have sued the defendant at law at all, because she was a married woman. Nor could they have sued her in equity, because, in fact, she had no separate estate. It was not argued that she had, and it could not have been argued, because all the evidence is that she had none.

Accordingly, in order to succeed the plaintiffs must rest their case upon statute. Two Acts of Parliament have been relied upon. One of them is the Married Women's Property Act of 1882. A portion of that Act has been repealed, still s. 1, sub-s. 2, remains, and under it a married woman can be sued as if she was a feme sole, and may also contract as such. But it has been held, properly I think, that this right to contract only exists where the married woman has separate property at the time. So far, therefore, as the present case is concerned the Act of 1882 does, indeed, authorize the action being brought against a defendant in her own name, but it does not give any effective remedy against her or entitle the plaintiffs to judgment as soon as it appears that she had no separate estate at the time of the alleged contract. The second Act relating to this subject is the Married Women's Property Act of 1893. The only chance of the plaintiffs is to bring their case within that Act.

The Act of 1893 provided that all the present or future separate estate of a married woman should be available to answer every contract she might enter into, where she entered into it 'otherwise than as agent.' It does not signify under this Act whether or not she had separate estate at the time. If she was acting as an agent, the Act of 1893 will not apply. If she was acting otherwise than as agent, then the Act will apply. I think it is clear that the plaintiffs are entitled to succeed in the present case if Mrs. Holden ordered these goods on her own account, and equally clear that they must fail if she ordered them as agent of her husband.

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Mr. Isaacs argued that, in order to prove that she entered into the contract as an agent, a married woman must establish, not merely that she was, in fact, an agent for her husband, but also that the other contracting party knew it, and contracted with her on those terms. I cannot adopt that view. The Act of 1893 does not mean that a married woman's separate estate is to answer her contracts unless both parties to the contract deal on the footing that she is an agent. It means, in my opinion, that the separate estate is not to answer when, in fact, she entered into the contract as an agent.

Before the Act was passed a tradesman could fix a husband with liability for a debt contracted by his wife, if he could prove either express or implied authority from the husband. It was immaterial whether at the time the contract was made the tradesman knew that the wife had her husband's authority, or even knew that she was a married woman. The knowledge of the tradesman was immaterial. I think it is equally immaterial under the Act of 1893.

It is now necessary to advert to the course of the trial. Evidence was given by the plaintiff's manager and also by the defendant, and a variety of issues were raised. They were embodied in five questions left by Lawrence J. to the jury. The jury could not agree upon a verdict, and in the end the learned judge, in the hope of sparing the parties the expense of a new trial, entered judgment for the plaintiffs. When the case came before the Court of Appeal that judgment was reversed, upon the ground that there was no evidence of the defendant having entered into a contract otherwise than as an agent. That was the substance of the decision, although some of the learned judges in the Court of Appeal expressed opinions and purported to arrive at findings upon the evidence, some of which seem to be appropriate rather for a jury than for a Court.

It was argued by Mr. Bankes that even if there had been some evidence that the defendant contracted otherwise than as an agent the Court of Appeal would in this case have been at liberty under Order LVIII., r. 4, to draw their own inferences of fact and to enter judgment accordingly. The proper construction of Order LVIII., r. 4, has been the subject of criticism in *Millar* v. *Toulmin* (17 Q. B. D. 603; (1887) 12 App. Cas. 746) and *Allcock* v. *Hall* ([1891]

1 Q. B. 444). In the latter case all the judges of the Court of Appeal concurred in the opinion that they were at liberty to draw inferences of fact and enter judgment in cases where no jury could properly find a different verdict. Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough properly to be acted upon by a jury, is a fine distinction, and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value.

In the present case I think the Court of Appeal came to a sound conclusion. The only decisive question was whether the defendant made this contract as agent for her husband. Or, to put the same thing in other words, had she his authority, express or implied? In my opinion the evidence, which was uncontradicted and not impugned by cross-examination, leaves it beyond reasonable doubt that she did act with his authority. There was no evidence the other way. That is sufficient to dispose of her case.

I desire to add that while agreeing with the Court of Appeal in this particular conclusion of fact I think, as at present advised, that some of the inferences of fact which were drawn by the judges in the Court of Appeal were matters on which, as the evidence stands, a jury might reasonably have found either way.

[Lord Macnaghten agreed with the Lord Chancellor.]

Lord Robertson.—My Lords, in my opinion, the law governing this case is the 1st section of the Married Women's Property Act, 1893, and I quote the words which state the new rule set up for married women's contracts: 'Every contract hereafter entered into by a married woman, otherwise than as agent, shall be deemed to be a contract entered into by her with respect to, and to bind her separate property, whether she is or is not, in fact, possessed of or entitled to any separate property at the time when she enters into such contract.' The plain result of this enactment is that, unless the respondent entered into this

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contract as agent for her husband, she is liable to the appellants. Whether she entered into the contract as agent seems to me the only question in the case, and, the facts being perfectly free from dubiety, that question is one of law.

The facts which are relevant are these: The lady was living with her husband; she had his authority to buy such articles as those in question, and he knew of their purchase at least after it had been made. On the other hand, it is equally certain that the appellants did not know that the respondent had a husband living, or that she was living in cohabitation with him. The respondent manifested herself to the appellants merely as 'Mrs. V. Holden,' and they had no further or other knowledge of her status. It is obvious that this name was entirely consistent with her being a widow or a separated married woman, and that it was therefore insignificant on the question of agency. No circumstance or scintilla is suggested as raising a jury question whether the appellants did not in fact know that the respondent had a living husband and was living with him.

In these circumstances, what the respondent relies on is the undisclosed fact that she had her husband's authority; and the question of law is whether this is enough to make the contract that of an agent. In my opinion it is not, and the point may, as I think, be subjected to a very simple test, Did the appellants deal with the respondent as an agent? As already stated, they certainly did not, for they never heard of the existence of a husband. This being so, I find it legally impossible to hold that the respondent contracted as an agent; for, unless both parties regarded the respondent as an agent, she did not contract as agent.

It seems to me that, prima facie, every person who contracts contracts for himself or herself. The application of this to those who de facto hold the powers of agents is thus stated in 1 Smith's Mercantile Law, 10th ed. p. 173: 'If any agent contract without disclosing that he has any principal, he is himself the person prima facie responsible.'

In the present case, where the respondent affected and purported to stand on her own feet vis-à-vis to the appellants, and did not apprise them of anything about herself to suggest agency, she must be held to have contracted personally. And the 1st

section of the Act of 1893 places beyond dispute the capacity of a married woman to contract personally, and places the case of agency in antithesis and exception to the primary case of contract, viz., personal contract.

My Lords, I have stated my view shortly, and I feel that it would be superfluous to protest the irrelevancy of several suggested topics. Thus, it is surely unnecessary to deprecate such phrases as that this lady contracted in her married name (as if she had the choice of two names either of which she could truthfully give to a tradesman). Again, the question before the House being solely whether this lady is liable, it is nothing to the purpose to prove that an undisclosed principal might also be liable.

The only hesitation which I feel about the case is whether it is permissible to withhold it from further trial by jury. But a careful examination of the evidence has satisfied me that there are no questions of fact remaining in dubio, and that the sharp question of law which I have discussed is decisive of the controversy.

I am therefore for allowing the appeal and finding the appellant entitled to judgment, with costs.

[Lord Atkinson agreed with Lord Robertson.]

Lord Loreburn, L.C.—My Lords, I find among the precedents the case of *Eastern Steamship Co. Ld.* v. *Smith* ([1891] A. C. 310, 316), on June 26, 1891, where the record is as follows: 'It being moved to reverse the judgments or decrees complained of, the same was objected to, and inasmuch as the votes were equal, two for reversing and two for affirming, thereupon, according to the ancient rule of law "Semper præsumitur pro negante," the question for reversal was determined in the negative; therefore the judgment or decree complained of was affirmed and the appeal dismissed.'

There is a note, which I believe is accurate, that costs are never given in such a case. I propose to your Lordships that that rule be adopted in this case, unless your Lordships think otherwise.

Order of the Court of Appeal affirmed, and appeal dismissed without costs.

BECK v. PIERCE.

'At Common Law as regarded a contract made by a woman before her marriage, but which was not sued upon till after her marriage, she and her husband were sued together, and, if it was proved that the contract on which the action was brought had been made by the wife before marriage, the judgment went against both husband and wife, and the execution followed the judgment. In those days one mode of execution was by a capias ad satisfaciendum, and the writ went against both husband and wife, so that the wife could be taken in execution to satisfy the judgment.'—Per Lord Esher, M.R., in *Scott* v. *Morley* (1887) 20 Q. B. D. at p. 123.

BECK *v.* PIERCE (1889) 23 Q. B. D. 316

The action was by a solicitor in respect of charges incurred by the defendant's wife before the defendant's marriage with her. The defendant pleaded in his defence a judgment recovered against the wife for the same charges: and, as to a portion of the claim, that it had accrued more than six years before the commencement of the action.

The facts were as follows. The work, in respect of which the action was brought, had been done for the defendant's wife before her marriage: a portion of it was done more than six years before the commencement of the action, the remainder having been done since: all of it was done within six years before the defendant's marriage. The plaintiff had sued the defendant's wife after the marriage, and obtained judgment for the full amount of his bill against her in the usual form, payable out of her separate estate. There being no separate estate however, the judgment remained unsatisfied. The defendant was not made a party to that action. It was admitted that the defendant had acquired from his wife property exceeding in value the amount claimed.

[GRANTHAM, J., gave judgment for the defendant. The plaintiff appealed.]

The judgment of the Court (Lord Esher, M.R., Lindley and Bowen, L.JJ.) was delivered by

LINDLEY, L.J.—The plaintiff is a solicitor, and he sues for payment of a bill of costs incurred by the defendant's wife before her marriage. About one half of the bill is for work done more than six years before the commencement of the action; the other half is for work done since; and all the work was done

within six years before the defendant's marriage. After the marriage the plaintiff sued the wife, and obtained judgment against her for the full amount of the bill, but payable out of her separate estate. She has none, and the judgment is wholly unsatisfied. The defendant was not made a party to those proceedings. Two defences are relied upon, viz., first, the judgment recovered against the wife is said to be a defence to the whole action. Secondly, the Statute of Limitations is pleaded to so much of the plaintiff's claim as became due more than six years before the writ was issued. Both these defences require attention.

The Married Women's Property Act has materially altered the position of husbands and wives towards the creditors of wives. The rights of creditors of women who marry before they have paid their debts are totally different from what they were at common law.

At common law a husband was liable to such debts to the whole extent of his property, whether he knew of their existence or not, and whether he obtained any property from his wife or none. But he could not be sued alone for such debts, if his wife was alive: and he could not be sued at all for them after his wife's death (Co. Litt. 351 b; Com. Dig. Baron and Feme, Y and 2 C). Nor was a promise by him to pay such debts of any avail, if the only consideration for the promise was his pre-existing liability to pay them; (*Mitchinson* v. *Hewson* (7 T. R. 348)), where such a promise was averred.) Nor would a Court of Equity assist his wife's creditors against him, even if he had acquired property through her: *Heard* v. *Stanford* (2 Eq. Ca. Ab. 134, pl. 5). If he and she were both sued, and judgment was recovered against both, such judgment could be enforced against the survivor. If judgment was recovered against her before her marriage, a sci. fa. lay against him and her after marriage, and, if judgment was obtained against them both on such sci. fa., and then she died, such judgment bound him. (*Obrian* v. *Ram* (3 Mod. 186; and also cited in *Woodyer* v. *Gresham*, 1 Salk. 116)). But a judgment against her alone did not affect him after her death (Ibid.), except of course in his character of administrator.

The Married Women's Property Act (45 & 46 Vict. c. 75) has entirely altered the law as regards the liabilities of husbands for their wives' ante-nuptial debts. First, he can now be sued

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without her, and whether she be alive or dead: see s. 14, and the expression in s. 15, 'if in any action brought against the husband alone.' Secondly, he can be sued with her under s. 15, if the plaintiff seeks to establish his claim wholly or in part against both husband and wife; but in this case the judgments may be separate, although to the extent to which they are both liable, the judgment may be 'a joint judgment against the husband personally, and against the wife as to her separate property.' What the word 'joint' means in this sentence is not clear. Having regard to ss. 13 and 14, it would be strange if on the death of husband or wife the survivor should alone be liable, if judgment against them both were obtained under s. 15. Thirdly, the husband's liability is no longer unlimited as at common law; it is limited to the value of his wife's property which he may have acquired: see s. 14. Fourthly, as between him and her he is entitled to be indemnified out of her separate property: see s. 13.

The husband's liability since the Married Women's Property Act is, as it was before, a liability in respect of his wife's contracts or torts, and not a liability in respect of his own contracts or torts; and, although he is not a surety, any defence open to her appears to be open to him also: for otherwise the creditor by suing the husband first would be able to obtain judgment against him and then he would be able to obtain indemnity against his wife; and in that way she could be made liable indirectly to a greater extent than she could be made liable directly. Such a result does not seem consistent with the Act nor with ordinary principles of justice. Such being the husband's liability, it cannot be regarded as a joint liability only; if sued alone he cannot require his wife to be joined; and, if she is sued alone in respect of her separate estate, she cannot require her husband to be joined: see s. 1, sub-s. 2, and s. 13. The cases therefore of *King* v. *Hoare* (13 M. & W. 494), and *Kendall* v. *Hamilton* (4 App. Cas. 504), have no application to actions against husbands for their wives' ante-nuptial debts; and notwithstanding the judgment obtained by the present plaintiff against the defendant's wife, as that judgment is wholly unsatisfied, this action is clearly maintainable, except so far as it may be barred by the Statute of Limitations.

The husband's liability for his wife's ante-nuptial contracts

first accrues on his marriage, unless he has previously done some act making him responsible for them. This proposition is self-evident, and is equally true whether his liability is imposed by common law or by statute. Perhaps, therefore, it might have been originally held that, as no right of action against him existed until marriage, the Statute of Limitations did not begin to run against him until the happening of the same event. But the cause of action in respect of which he is liable is his wife's contract, not his own, and the Statute of Limitations has always been regarded as beginning to run in his favour as well as his wife's from the time when the cause of action accrued against her; and any acknowledgment or part payment by her before marriage kept her debt alive both as against her and her after-taken husband; but similar acts by her after marriage were of no avail either against herself or as against her husband (*Pittam* v. *Foster* (1 B. & C. 248); *Neve* v. *Hollands* (18 Q. B. 262)). The Statute of Limitations applies to debts payable by a married woman out of her separate estate (see *Hallett* v. *Hastings* (35 Ch. D. 94)), and the Married Women's Property Act apparently enables a wife to keep alive her liabilities in respect of her separate estate by making an acknowledgment or by part payment, or by suffering judgment to be obtained against her; but such acts of hers do not, we apprehend, affect her husband. On the other hand, similar acts by him will not affect her direct liability to her creditors. Whether if he chooses to keep alive his liability, he can still claim the benefit of his right to indemnity under s. 13, is a question not necessary now to determine; but we can find nothing in the Married Women's Property Act to alter the cause of action of the plaintiff. The plaintiff's cause of action against the defendant is still founded on his wife's contract: and the plaintiff's cause of action is no more now the defendant's marriage than it was before the passing of the Act. Although the defendant's marriage is what makes him liable, there is no more reason now than there was before for saying that with reference to the Statute of Limitations the cause of action accrues against him on his marriage as distinguished from the time when it accrued against his wife. The Married Women's Property Act does not purport to amend or alter the law as regards the time within which actions must be commenced. The law in that respect is what it was. It was

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contended that the plaintiff's cause of action against the wife did not in fact accrue until all the work which the plaintiff did for her was wholly complete: and reliance was placed on *Whitehead* v. *Lord* (7 Ex. 691). This point was disposed of in the course of the argument. We cannot think that the reasoning in that case applies to miscellaneous work done by a solicitor for his client, although it may apply to such continuous work as bringing and prosecuting an action.

The defendant in this case can therefore avail himself of the Statute of Limitations as to so much of the plaintiff's demand as accrued to him against the defendant's wife more than six years before the commencement of the present action; but as to the rest the defendant is liable.

The appeal therefore will be allowed, and judgment be entered for the plaintiff for the amount sued for less 33*l.* 1*s.*, the amount barred by the statute.

Appeal allowed.

'The principle is well illustrated in the civil law, as stated in the Digest, lib. 18, tit. 1, De Contrahenda Emptione, leges, 9, 10, 11. There, after laying down the general rule, that where the parties are not at one as to the subject of the contract there is no agreement, and that this applies where the parties have misapprehended each other as to the corpus, as where an absent slave was sold and the buyer thought he was buying Pamphilus and the vendor thought he was selling Stichus, and pronouncing the judgment that in such a case there was no bargain because there was "error in corpore", the framers of the Digest moot the point thus: "inde quaeritur, si in ipso corpore non erretur, sed in substantia error sit, ut puta si acetum pro vino veneat, aes pro auro, vel plumbum pro argento vel quid aliud argento simile: an emptio et venditio sit;" and the answers given by the great jurists quoted are to the effect that if there be misapprehension as to the substance of the thing there is no contract; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding. Paulus says: 'si aes pro auro veneat, non valet, aliter atque si aurum quidem fuerit, deterius autem quam emptor existimarit; tunc enim emptio valet . . .' And, as we apprehend, the principle of our law is the same as that of the civil law; and the difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration.'—Per Blackburn, J., in *Kennedy* v. *Panama, &c., Mail Co.* (1867) L. R. 2 Q. B. at p. 587.

SMITH *v.* HUGHES (1871) L. R. 6 Q. B. 597

APPEAL from the County Court of Surrey holden at Epsom.

The plaintiff sought to recover 34*l.* 15*s.* 8*d.*, being the price of sixteen quarters of oats sold by the plaintiff to the defendant at 34*s.* per quarter, and the loss on the resale by the plaintiff of twenty-nine quarters of oats agreed to be purchased by the defendant, and which he refused to receive; and the storage of the quarters of oats for five weeks.

The plaintiff is a farmer. The defendant is an owner and trainer of racehorses.

The plaintiff's evidence was as follows: 'In July last I had a quantity of new winter oats for sale. I was anxious to get rid

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of them, because oats were then dear, the supply of English oats being very short. On Saturday, the 31st of July, I took a sample of these oats to Hughes, who manages for the defendant, and asked him if he was a buyer of oats. He replied he was always a buyer of good oats. I said I had some good oats for sale; he asked me how many? I told him from forty to fifty quarters; he said he would have them all if they were good. I shewed him my sample, and asked 35*s.* a quarter; he took the sample, and said he would give me an answer next day. On the following Monday he wrote to me to say he would take the oats at 34*s.* a quarter, and I then sent in sixteen quarters. Soon afterwards I met the defendant, and he said, "Why, those were new oats you sent me." I replied, "Well, I knew they were, and had none others." He said, "I thought I was buying old oats. New oats are useless to me; you must take them back again." I refused to take them back.' On cross-examination, the plaintiff said: 'I was not aware that the defendant never bought new oats. I do not know that trainers never use new oats; a trainer has since this transaction offered me money for new oats. I never told defendant that they were old oats. Nothing was said about it: the word "old" was not mentioned by either of us.'

Hughes, the defendant's manager, stated: 'The plaintiff asked me if I was a buyer of oats. I said I was always a buyer of good old oats. He said, "I have some good old oats for sale," and gave me a sample, and asked me 35*s.* a quarter. I said I would let him know. I wrote to say I would give him 34*s.* When I found they were new oats, I refused to have them, and they were immediately returned to the plaintiff on his refusal to fetch them back. I never buy new oats if I can get old. Trainers, as a rule, use old oats.' On cross-examination, witness hesitated and contradicted himself somewhat as to whether the word 'old' was used at the time of making the contract.

Evidence was also given for the defendant, that at the time of the contract 34*s.* a quarter was a very high price for new oats, and such as a prudent man of business would not have given; but that oats were then very scarce.

In summing up, the judge told the jury that the first question for their consideration was, whether the word 'old' had been used by the plaintiff or defendant in making the contract, and that the

inclination of his opinion was that the word 'old' had not been so used; but that was a question entirely for their consideration. If they were of opinion that the word 'old' had been so used, they would return a verdict for the defendant. If, however, they thought that the word 'old' had not been used, the second question would be, whether they were of opinion, on the state of the evidence, that the plaintiff believed the defendant to believe, or to be under the impression, that he was contracting for the purchase of old oats. If so, there would be a verdict for the defendant. But if the jury were of opinion that nothing was said as to the oats being old or new, and if they were of opinion that the plaintiff did not believe that the defendant believed or was under the impression that he was contracting for old oats, then they would find for the plaintiff.

The jury found a verdict for the defendant.

The question for the opinion of the Court was, whether the direction to the jury as above is or is not correct.

Pollock, Q.C. (*McKellar* with him), for the plaintiff. The judge was wrong to leave the second question to the jury. If the plaintiff believed the defendant to believe that he was buying old oats, the plaintiff was under no legal obligation to undeceive him. The defendant had the sample; he could judge for himself what he was buying, and if he had any doubt as to the subject-matter of the contract he might have demanded a warranty. In Benjamin on the Sale of Personal Property, p. 315, it is stated: 'The mistaken belief as to facts may be created by active means or by fraudulent concealment, or knowingly false representation; or passively, by mere silence, when it is a duty to speak. But it is only where a party is under some pledge or obligation to reveal facts to another that mere silence will be considered as a means of deception.' So in Story on Contracts, s. 519, it is laid down: 'A distinction should be observed between the concealment of extrinsic circumstances affecting the value of the subject-matter of sale, or operating as an inducement to a contract, such as the state of the market; and the concealment of intrinsic circumstances appertaining to its nature, character, and condition, such as natural defects and injuries. In respect of intrinsic circumstances, the rule is that mere silence as to anything which the other party

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might by proper diligence have discovered, and which is open to his examination, is not fraudulent unless a special trust or confidence exist between the parties, or be implied from the circumstance of the case. . . . In respect to extrinsic circumstances, the rule is that neither party is ordinarily bound to notify them to the other, and mere concealment will not nullify the contract. But the party concealing a fault must be careful to do no act and say no word indicative of his assent to any mistaken proposition by the other ; and must play an entirely negative part, for if he do anything positive he will render himself liable.' If, therefore, the plaintiff believed that the defendant was under the impression that he was buying old oats, and did nothing by word or act to produce this impression on the mind of the defendant, but merely allowed him to remain under that impression, the plaintiff's conduct is not such as would avoid the contract. According to Paley,[1] a promise is to be interpreted ' in the sense in which the promiser apprehended at the time that the promisee received it.' The judge's direction ought to have been, that if the plaintiff believed the defendant to believe that the plaintiff had contracted to sell to the defendant old oats, then they should find their verdict for the defendant. The question as to the difference between concealment and mere silence is discussed by Cicero.[2] He puts the case of a merchant at Rhodes selling corn in a time of scarcity, and asks the question whether the seller is bound to inform the buyer of what he is aware but the buyer is not, viz., that there are other ships laden with corn on their way to Rhodes. The conclusion arrived at appears to be that he is not acting dishonestly in not giving the information.

Arthur Wilson, for the defendant.

Pollock, Q.C., in reply.

Cur. adv. vult.

BLACKBURN, J.—In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess

[1] Paley's Moral and Political Philosophy, book III., chap. 5.
[2] Cicero de Officiis, Lib. III., capp. xii., xiii.

that quality. And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor. And I also agree that where a specific lot of goods are sold by a sample, which the purchaser inspects instead of the bulk, the law is exactly the same, if the sample truly represents the bulk; though, as it is more probable that the purchaser in such a case would ask for some further warranty, slighter evidence would suffice to prove that, in fact, it was intended there should be such a warranty. On this part of the case I have nothing to add to what the Lord Chief Justice has stated.

But I have more difficulty about the second point raised in the case. I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman* v. *Cooke* (2 Ex. at p. 663; 18 L. J. (Ex.) at p. 119). If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

The jury were directed that, if they believed the word 'old' was used, they should find for the defendant—and this was right; for if that was the case, it is obvious that neither did the defendant intend to enter into a contract on the plaintiff's terms, that is, to buy this parcel of oats without any stipulation as to their quality; nor could the plaintiff have been led to believe he was intending to do so.

But the second direction raises the difficulty. I think that, if

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from that direction the jury would understand that they were first to consider whether they were satisfied that the defendant intended to buy this parcel of oats on the terms that it was part of his contract with the plaintiff that they were old oats, so as to have the warranty of the plaintiff to that effect, they were properly told that, if that was so, the defendant could not be bound to a contract without any such warranty unless the plaintiff was misled. But I doubt whether the direction would bring to the minds of the jury the distinction between agreeing to take the oats under the belief that they were old, and agreeing to take the oats under the belief that the plaintiff contracted that they were old.

The difference is the same as that between buying a horse believed to be sound, and buying one believed to be warranted sound; but I doubt if it was made obvious to the jury, and I doubt this the more because I do not see much evidence to justify a finding for the defendant on this latter ground if the word 'old' was not used. There may have been more evidence than is stated in the case; and the demeanour of the witnesses may have strengthened the impression produced by the evidence there was; but it does not seem a very satisfactory verdict if it proceeded on this latter ground. I agree, therefore, in the result that there should be a new trial.

HANNEN, J.—I think there should be a new trial in this case, not because the ruling of the county court judge was incorrect, but because, having regard to the evidence, I think it doubtful whether the jury sufficiently understood the direction they received to enable them to take it as their guide in determining the question submitted to them.

It appears from the evidence on both sides that the plaintiff sold the oats in question by a sample which the defendant's agent took away for examination. The bargain was only completed after this sample had been in the defendant's possession for two days. This, without more, would lead to the conclusion that the defendant bought on his own judgment as to the quality of the oats represented by the sample and with the usual warranty only, that the bulk should correspond with it. There might, however, be superadded to this warranty an express condition that the oats should be old, and the defendant endeavoured by his evidence to establish

that there was such an express bargain between him and the plaintiff. This was the first question which the jury had to consider; but as they have not stated whether they answered it in favour of the defendant, it is possible—and, from the judge's report, it is most probable—that they did not so answer it, and the case must be considered on the assumption that there was no express stipulation that the oats were old.

There might have been an implied term in the contract arising from previous dealings or other circumstances, that the oats should be old; but the learned judge probably thought the evidence did not make it necessary that he should leave this question to the jury. And the second question, which he did leave to them, seems intended to ascertain whether there was any contract at all between the parties.

It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. Thus, if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship in his mind, no contract would exist between them: *Raffles* v. *Wichelhaus* (2 H. & C. 906; 33 L. J. (Ex.) 160).

But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. Thus in the case of a sale by sample where the vendor, by mistake, exhibited a wrong sample, it was held that the contract was not avoided by this error of the vendor: *Scott* v. *Littledale* (8 E. & B. 815; 27 L. J. (Q. B.) 201).

But if in the last-mentioned case the purchaser, in the course of the negotiations preliminary to the contract, had discovered that the vendor was under a misapprehension as to the sample he was offering, the vendor would have been entitled to shew that he had not intended to enter into the contract by which the purchaser sought to bind him. The rule of law applicable to such a case is a corollary from the rule of morality which Mr. Pollock cited from Paley,[1] that a promise is to be performed 'in that sense in which the promiser apprehended at the time the promisee received it,' and may be thus expressed: 'The promiser is not bound to

[1] Moral and Political Philosophy, Book III., ch. v.

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fulfil a promise in a sense in which the promisee knew at the time the promiser did not intend it.' And in considering the question, in what sense a promisee is entitled to enforce a promise, it matters not in what way the knowledge of the meaning in which the promiser made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promiser, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promiser did not assent.

If, therefore, in the present case, the plaintiff knew that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was only the apparent, and not the real bargain.

This was the question which the learned judge intended to leave to the jury; and, as I have already said, I do not think it was incorrect in its terms, but I think that it was likely to be misunderstood by the jury. The jury were asked, 'whether they were of opinion, on the whole of the evidence, that the plaintiff believed the defendant to believe, or to be under the impression that he was contracting for the purchase of old oats? If so, there would be a verdict for the defendant.' The jury may have understood this to mean that, if the plaintiff believed the defendant to believe that he was buying old oats, the defendant would be entitled to the verdict; but a belief on the part of the plaintiff that the defendant was making a contract to buy the oats, of which he offered him a sample, under a mistaken belief that they were old, would not relieve the defendant from liability unless his mistaken belief were induced by some misrepresentation of the plaintiff, or concealment by him of a fact which it became his duty to communicate. In order to relieve the defendant it was necessary that the jury should find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats.

I am the more disposed to think that the jury did not understand the question in this last sense because I can find very little, if any,

evidence to support a finding upon it in favour of the defendant. It may be assumed that the defendant believed the oats were old, and it may be suspected that the plaintiff thought he so believed, but the only evidence from which it can be inferred that the plaintiff believed that the defendant thought that the plaintiff was making it a term of the contract that the oats were old is that the defendant was a trainer, and that trainers, as a rule, use old oats ; and that the price given was high for new oats, and more than a prudent man would have given. SMITH v. HUGHES. Hannen, J.

Having regard to the admitted fact that the defendant bought the oats after two days' detention of the sample, I think that the evidence was not sufficient to justify the jury in answering the question put to them in the defendant's favour, if they rightly understood it ; and I therefore think there should be a new trial.

[COCKBURN, C.J., delivered judgment to the same effect.]

Judgment accordingly.

' In Fry on Specific Performance, 5th ed., s. 765, the law is thus stated : " It seems on general principles clear that one party to a contract can never defend himself against it by setting up a misunderstanding on his part as to the real meaning and effect of the contract, or any of the terms in which it is expressed. To permit such a defence would be to open the door to perjury and to destroy the security of contracts." '—Per Swinfen Eady, L.J., in *Eastes* v. *Russ* [1914] 1 Ch. at p. 480. TAMPLIN v. JAMES.

TAMPLIN *v.* JAMES (1879) 15 Ch. D. 215

This was an action by vendors for specific performance.

On the 25th of July the Plaintiffs, who were the trustees of a will, put up certain parts of their testator's property for sale in lots. Lot 1 was described as follows :—

' All that well-accustomed inn, with the brewhouse, outbuildings, and premises known as *The Ship*, together with the messuage, saddler's shop, and premises adjoining thereto, situate at *Newerne*, in the same parish, No. 454 and 455 on the said tithe map, and containing by admeasurement twenty perches, more or less, now in the occupation of Mrs. *Knowles* and Mr. *S. Merrick*.

' This lot is situate close to the *Lydney Town* station, on the *Severn and Wye Railway*, and abuts on other premises of the

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vendors, on the canal, and on lands now or late of the Rev. *W. H. Bathurst.*'

Lot 1 was not sold at the auction, but immediately afterwards the Defendant, who had been present at the auction, made an offer for it which was accepted, and signed a contract for purchase according to the conditions of sale at the price of £750.

At the back of Lot 1, and of the house adjoining it, lay three plots of garden ground, which had formerly belonged to the Rev. *W. H. Bathurst*, but had since been purchased by the railway company. One of these pieces of ground was in the occupation of the tenant of the messuage and saddler's shop, and the other in the occupation of the tenant of *The Ship Inn.* The tenants each held his house and the garden ground at one rent, which was paid to the vendors' agent, who accounted to the owners of the garden ground for their proportions of the rent. The origin of this arrangement, which had been acted upon for many years, did not appear. The rent paid for the gardens was 10*s.* a year each. Each of these two pieces, which together contained about twenty perches, was partially divided by a fence from the premises with which it was occupied, but there was no boundary of such a nature as to suggest that it belonged to a different owner.

It appeared that at the auction two plans of Lot 1 were lying on the table, and the auctioneer called the attention of the persons present to them. One of them was a tracing from the tithe map, the other was a tracing on a much larger scale from a map belonging to the railway company. On this latter plan the pieces of garden ground were marked as belonging to the railway company, and in each plan the property forming Lot 1 was coloured, so as to distinguish it from the adjoining property. It was correctly described as being 454 and 455 on the tithe map, and included the whole of the closes so numbered.

The Defendant deposed that he had not seen the plans, and was not aware of there being any plans in the room; that he had known the property from a boy, and knew that the two plots of garden ground had all along been occupied with *The Ship Inn* and the saddler's shop respectively; and that he bought in the full belief that he was buying all that was in the occupation of the tenants, and he declined to complete unless the gardens were conveyed to him.

The hearing took place before Lord Justice *Baggallay*, in consequence of the illness of Vice-Chancellor *Malins*.

BAGGALLAY, L.J., after stating the leading facts, continued :—

The Defendant insists in his statement of defence that he signed the memorandum in the reasonable belief that the property comprised therein included the whole of the premises in the occupation of Mrs. *Knowles* and of Mr. *Samuel Merrick*, and not merely the messuages and hereditaments which the Plaintiffs allege to be the only property comprised therein, and that such his belief was induced and confirmed by the acts and words of the auctioneer at the sale. The Defendant has sworn positively that he had such a belief at the time he signed the memorandum, and I see no reason to doubt the statement so made by him ; but was such a belief a reasonable belief ?

It is doubtless well established that a Court of Equity will refuse specific performance of an agreement when the Defendant has entered into it under a mistake, and where injustice would be done to him were performance to be enforced. The most common instances of such refusal on the ground of mistake are cases in which there has been some unintentional misrepresentation on the part of the Plaintiff (I am not now referring to cases of intentional misrepresentation which would fall rather under the category of fraud), or where from the ambiguity of the agreement different meanings have been given to it by the different parties. The case of *Manser* v. *Back* (6 Hare, 443) is a well-known illustration of this. It is true also that specific performance has been refused in cases not coming under either of these heads, as in *Malins* v. *Freeman* (2 Keen, 25). But where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the Defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. Were such to be the law the performance of a contract could rarely be enforced upon an unwilling party who was also unscrupulous. I think that the law is correctly stated by Lord *Romilly* in *Swaisland* v. *Dearsley* (29 Beav. 430, 433) : ' The principle on which the Court proceeds in cases of mistake is this—if it appears upon the evidence that there was in the description of the property a matter on which a person might *bona fide* make

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a mistake, and he swears positively that he did make such mistake, and his evidence is not disproved, this Court cannot enforce the specific performance against him. If there appears on the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for the purchaser to swear that he made a mistake, or that he did not understand what he was about.' The observations of Vice-Chancellor *Wigram* in *Manser* v. *Back* (6 Hare, 443, 448) seem to me to tend in the same direction.

Now does it appear, or can it safely be held in this case that the Defendant reasonably entertained a belief that the gardens were included in the property purchased by him ? I will consider first the terms of the contract itself, and then the allegations as to the acts and words of the auctioneer and other agents of the Plaintiffs, for it is possible that although the terms of the agreement taken *per se* may have been free from doubt, enough may have been said or done by the Plaintiffs' agents to lead the Defendant to attribute a different meaning to its terms.

Mr. *Pearson* admitted, and I think he could not well have avoided admitting, that if the vendors had merely referred to the property as being in the occupation of Mrs. *Knowles* and Mr. *Merrick* without more, there would have been at any rate such an amount of ambiguity that the Defendant might reasonably have understood that he was purchasing the whole of the property in their occupation. But the particulars go on to state that the property sold is Nos. 454 and 455 on the tithe map and contains twenty perches. The additional land which the Defendant claims to have included is about twenty perches more. Therefore, if he is right in his contention, he would be entitled to double the amount which the printed particulars state the lot to contain. There, no doubt, is force in the argument that a person unaccustomed to measuring would not know whether a property contained twenty perches or forty perches, but that does not get rid of the effect of the reference to the tithe map. The Defendant appears to have purchased in reliance upon his knowledge of the occupation of the premises without looking at the plans, and probably without paying any attention to the details of the particulars of Lot 1, but is a person justified in relying upon

knowledge of that kind when he has the means of ascertaining what he buys? I think not. I think that he is not entitled to say to any effectual purpose that he was under a mistake, when he did not think it worth while to read the particulars and look at the plans. If that were to be allowed, a person might always escape from completing a contract by swearing that he was mistaken as to what he bought, and great temptation to perjury would be offered. Here the description of the property is accurate and free from ambiguity, and the case is wholly unaffected by *Manser* v. *Back* (6 Hare, 443) and the other cases in which the Defendant has escaped from performance of a contract on the ground of its ambiguity.

[His Lordship then entered into an examination of what passed at the sale, and stated his reasons for coming to the conclusion that nothing had been said or done by the vendor's agents which could lead the purchaser to misconstrue the particulars.]

A decree for specific performance was therefore made.

From this decision the Defendant appealed.

JAMES, L.J.—In my opinion, the order under appeal is right. The vendors did nothing tending to mislead. In the particulars of sale they described the property as consisting of Nos. 454 and 455 on the tithe map, and this was quite correct. The purchaser says that the tithe map is on so small a scale as not to give sufficient information, but he never looked at it. He must be presumed to have looked at it, and at the particulars of sale. He says he knew the property, and was aware that the gardens were held with the other property in the occupation of the tenants, and he came to the conclusion that what was offered for sale was the whole of what was in the occupation of the tenants, but he asked no question about it. If a man will not take reasonable care to ascertain what he is buying, he must take the consequences. The defence on the ground of mistake cannot be sustained. It is not enough for a purchaser to swear, 'I thought the farm sold contained twelve fields which I knew, and I find it does not include them all,' or, 'I thought it contained 100 acres and it only contains eighty.' It would open the door to fraud if such a defence was to be allowed. Perhaps some of the cases on this subject go too far, but for the most part the cases where a Defendant has

TAMPLIN v. JAMES. James, L.J.

escaped on the ground of a mistake not contributed to by the Plaintiff, have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it. *Webster* v. *Cecil* (30 Beav. 62) is a good instance of that, being a case where a person snapped at an offer which he must have perfectly well-known to be made by mistake, and the only fault I find with the case is that, in my opinion, the bill ought to have been dismissed with costs. It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side. Here are trustees realizing their testator's estate, and the reckless conduct of the Defendant may have prevented their selling to somebody else. If a man makes a mistake of this kind without any reasonable excuse he ought to be held to his bargain.

[BRETT and COTTON, L.JJ. delivered judgments to the same effect.]

JAMES, L.J.—I also am of opinion that where an action is brought for specific performance, and specific performance is refused on the sole ground of a mistake by the Defendant, the Court ought to give the same damages as would, under the old practice, have been given in an action at law.

Appeal dismissed.

CARLISLE AND CUMBERLAND BANKING COMPANY v. BRAGG.

'It is well settled that where a person is induced to execute a deed by a false representation as to the nature and character of the document he is signing—where the document is of a totally different character from what he was told it was—such a deed does not bind him.'—Per Swinfen Eady, J., in *Bagot* v. *Chapman* [1907] 2 Ch. at p. 227.

'The position that mere negligence of an alleged grantor may estop him from showing that an instrument purporting to be his deed is not his deed seems to me both novel and dangerous. The arguments drawn from negotiable instruments appear altogether inapplicable. The object of the law merchant, as to bills and notes made or become payable to bearer, is to secure their circulation as money; therefore bonest acquisition confers title. To this despotic but necessary principle the ordinary rules of the common law are made to bend.'—Per Byles, J., in *Swan* v. *North British Australasian Co.* (1863) 2 H. & C. at p. 184.

CARLISLE AND CUMBERLAND BANKING CO. *v.* BRAGG
[1911] 1 K. B. 489

Application by the plaintiffs for judgment or a new trial in an action tried before Pickford J. with a jury.

The action was upon a document which purported to be a continuing guarantee by the defendant, up to the amount of 150*l.*, of the payment by one Rigg to the plaintiffs of any sum which might at any time thereafter be or become due from him to the plaintiffs on the general balance of his banking account with them.

The defendant in his defence denied that he signed the guarantee upon which the action was brought, and alleged that, if he did, his signature to the same was fraudulently obtained by Rigg, who falsely represented to him that the said guarantee was an insurance paper. The evidence, so far as material to this report, appeared to be, in substance, as follows. The signature to the document was in fact the defendant's. Before the document was signed, the plaintiffs had required from Rigg a guarantee of his overdraft with them. On the occasion when the document was signed the defendant and Rigg had been drinking together. Rigg produced a paper, and asked the defendant to sign it; he did not read it to the defendant, or tell him that it was a guarantee. He told the defendant that the paper which the defendant had signed on a previous day had got wet, and blurred in the rain. The defendant did not read the paper which he was asked to sign, and stated in evidence that he did not know that it was a guarantee; that he thought that Rigg was referring to a paper which he, the defendant, had previously signed concerning some insurance matter, and that the paper which he was asked by Rigg to sign was to the same effect as that paper. Rigg, having procured the defendant's signature to the document, subsequently forged the signature of an attesting witness to it, and handed it to the plaintiffs. It was not disputed that Rigg was indebted to the plaintiffs on his banking account to the amount claimed in the action. The questions left by the learned judge to the jury and their answers thereto were as follows: (1.) Was the defendant induced to sign the guarantee by the fraud of Rigg?—Yes. (2.) Did the defendant know that the document which he signed

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was a guarantee?—No. (3.) Was the defendant negligent in signing the guarantee?—Yes. (4.) Was Rigg the agent of the bank?—No.

Upon these findings the learned judge on the authority of *Swan* v. *North British Australasian Co.* ((1862) 7 H. & N. 603 ; (1863) 2 H. & C. 175), gave judgment for the defendant.

VAUGHAN WILLIAMS, L.J.—In my opinion the judgment of Pickford J. in this case was quite right. He held that the finding of negligence by the jury was immaterial, and he did so after discussing the case of *Foster* v. *Mackinnon* (L. R. 4 C. P. 704), and coming to the conclusion that the doctrine there laid down as regards negligence really has reference to the particular case of a negotiable instrument, to an action on which the defence that the defendant was induced to sign the instrument by fraud and misrepresentation as to its nature is set up as against a bona fide holder for value. As I understand it, that doctrine is limited to negotiable instruments, and that was really the ground of the judgment of Pickford J. in this case. Now let me deal with the matter apart from any question of negotiable instruments. In this case the finding of the jury is that the signature of the defendant to this document was obtained by fraud. The jury were asked: 'Was the defendant induced to sign the guarantee by the fraud of Rigg?' They answered that he was. They then were asked: 'Did the defendant know that the document which he signed was a guarantee?' They answered in the negative. It seems to me that on those findings alone the defendant would be entitled to say in respect of this guarantee that it was not, in contemplation of law, signed by him. His signature was obtained by fraud, and it is manifest, on the evidence and the findings of the jury, that he was not intending to sign any such document. What he was intending to sign was some document with reference to insurance. It appears to me that under the circumstances of this case the mere fact that the jury have found that there was negligence on the part of the defendant does not raise such an estoppel as prevents the defendant from setting up the defence that he never signed the guarantee and that his signature to the document was obtained from him by fraud; that he did not know of its nature, or intend to sign a document

of that description. If the document in question had been not a guarantee, but a bill of exchange, and the question had arisen what was the position of a holder for value without notice of the fraud, the matter might have been different, because the law merchant, and now the statute law, puts persons who in such circumstances take bills of exchange and such like instruments in the position that they have to prove that they gave value for the bill or other like instrument honestly, but, if they prove that, it does not matter that it was originally procured by fraud.

The only other thing which I wish to say is on the question of negligence. I do not know whether the jury understood that there could be no material negligence unless there was a duty on the defendant towards the plaintiffs. Even if they did understand that, in my opinion, in the case of this instrument, the signature to which was obtained by fraud, and which was not a negotiable instrument, Pickford J. was right in saying that the finding of negligence was immaterial. I wish to add for myself that in my judgment there is no evidence whatsoever to shew that the proximate cause of the plaintiffs' advancing money on this document was the mere signature of it by the defendant. In my opinion, the proximate cause of the plaintiffs' making the advance was that Rigg fraudulently took the document to the bank, having fraudulently altered it by adding the forged signature of an attesting witness, and but for Rigg having done those things the plaintiffs would never have advanced the money at all. Under these circumstances I think that the appeal fails and must be dismissed.

BUCKLEY, L.J.—I am of the same opinion. There has been so much discussion during the argument as to the plea of non est factum, and the relevance of negligence in relation to it under the circumstances of this case, that I wish to say a few words expressing my view of the law on the subject. In an action upon a deed, the defendant may say by way of defence that it is not his deed, non est factum. If it is found to be his deed, the plaintiff gets judgment and there is an end of the case. But suppose that it is found not to be his deed, and he succeeds on non est factum, the case is not necessarily over, because the plaintiff may say, 'True you have established that this is not in fact

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your deed; but you are estopped by your conduct from saying that it is not your deed, and I can recover against you, although it is not your deed.' It is only in this latter case that the question of estoppel comes into action. Negligence has nothing to do with the question whether the deed is in fact the deed of the defendant. Negligence has only to do with the question of estoppel.

I know of only three ways in which a person can be informed of the contents of a document. It may be by the eye, or by the ear, or, in the case of a blind man, it may be by touch, as under Braille's system. In this last case touch may be treated as equivalent to sight. In the case of information as to the contents of a document by the ear, the recipient of information in that way may be deceived by his informant. I will suppose a case in which he asks a person who brings him a document what its effect is, and he is told untruly that its effect is what it is not, and then signs it. In that state of things in general the document will not be his deed. The true way of ascertaining whether a deed is a man's deed is, I conceive, to see whether he attached his signature with the intention that that which preceded his signature should be taken to be his act and deed. It is not necessarily essential that he should know what the document contains: he may have been content to make it his act and deed, whatever it contained; he may have relied on the person who brought it to him, as in a case where a man's solicitor brings him a document, saying, 'this is a conveyance of your property,' or 'this is your lease,' and he does not inquire what covenants it contains, or what the rent reserved is, or what other material provisions in it are, but signs it as his act and deed, intending to execute that instrument, careless of its contents, in the sense that he is content to be bound by them whatsoever they are. If, on the other hand, he is materially misled as to the contents of the document, then his mind does not go with his pen. In that case it is not his deed. As to what amounts to materially misleading there is of course a question. *Howatson* v. *Webb* ([1908] 1 Ch. 1) was a case in which the erroneous or insufficient information was not enough for the purpose. In general, the proposition is true that, if a man, acquainting himself with the contents of a deed by ear, and being told by another what it contains, receives false information as to its contents in a material respect, that is not his deed. As regards the plea of non est factum, that is this case, for the jury

have found that the defendant was induced to sign this guarantee by Rigg's fraud, not knowing that it was a guarantee; so that he was defrauded by the person who brought it to him, and did not know what it was. It seems to me that under those circumstances it was not his contract. I do not think myself that cases of this kind are to be confined to the blind and illiterate. Blindness and illiteracy constitute a state of things of which the equivalent for this purpose may under certain circumstances be predicated of persons who are neither blind nor illiterate. If a document were presented to me written in Hebrew or Syriac, I should for the purposes of that document be both blind and illiterate—blind in the sense that, although I saw some marks on the paper, they conveyed no meaning to my mind, and illiterate as regards the particular document, because I could not read it. It seems to me that the same doctrine applies to every person who is so placed as that he is incapable by the use of such means as are open to him of ascertaining, or is by false information deceived in a material respect as to, the contents of the document which he is asked to sign.

There remains the question whether the defendant is estopped. On that question I agree that the existence of negligence may be relevant. I do not wish to add anything to what Vaughan Williams L.J. has said on that subject. I do not think that there was in this case proof of any such negligence as would avail the plaintiffs as between themselves and the defendant. The defendant did not owe any duty to the plaintiffs, and the act of the defendant was not the act which involved the plaintiffs in loss. What involved the plaintiffs in loss was the act of Rigg, a rogue, who obtained from the defendant his signature to an instrument which he never intended to sign, and, having thus defrauded the defendant, proceeded to do another act which was what caused the plaintiffs loss. He took the document thus fraudulently obtained, and pretended to the plaintiffs that it was a genuine guarantee given by the defendant. In point of fact it was not. He knew how he had procured it, and that he had forged the signature of an attesting witness. It was that act which involved the plaintiffs in loss. Upon these grounds I think that the appeal fails and should be dismissed.

KENNEDY, L.J. delivered judgment to the same effect.

CUNDY v. LINDSAY.

'I think there is larceny by a trick where the owner of goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, but does not intend to pass the property in them, and the recipient has the animus furandi; and the same is true where the owner of the goods does not intend to pass the property in them to the particular person with whom he is dealing, and has been deceived by that person as regards the identity of the person with whom he is dealing. That was the case in *Cundy* v. *Lindsay*. On the other hand, goods are obtained by false pretences where the owner of the goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, and does intend to pass the property.'—Per Buckley, L.J., in *Whitehorn Brothers* v. *Davison* [1911] 1 K. B. at p. 479.

CUNDY *v.* LINDSAY (1878) 3 App. Cas. 459

Appeal from a decision of the Court of Appeal, which had reversed a previous decision of the Queen's Bench.

In 1873, one *Alfred Blenkarn* hired a room at a corner house in *Wood Street, Cheapside*—it had two side windows opening into *Wood Street*, but though the entrance was from *Little Love Lane* it was by him constantly described as 37, *Wood Street, Cheapside*. His agreement for this room was signed '*Alfred Blenkarn*.' The now Respondents, Messrs. *Lindsay & Co.*, were linen manufacturers, carrying on business at *Belfast*. In the latter part of 1873, *Blenkarn* wrote to the Plaintiffs on the subject of a purchase from them of goods of their manufacture—chiefly cambric handkerchiefs. His letters were written as from '37, *Wood Street, Cheapside*,' where he pretended to have a warehouse, but in fact occupied only a room on the top floor, and that room, though looking into *Wood Street* on one side, could only be reached from the entrance in 5, *Little Love Lane*. The name signed to these letters was always signed without any initial as representing a Christian name, and was, besides, so written as to appear '*Blenkiron & Co.*' There was a highly respectable firm of *W. Blenkiron & Son*, carrying on business in *Wood Street*—but at number 123, *Wood Street*, and not at 37. Messrs. *Lindsay*, who knew the respectability of *Blenkiron & Son*, though not the number of the house where they carried on business, answered the letters, and sent the goods addressed to 'Messrs. *Blenkiron & Co.*, 37 *Wood Street, Cheapside*,' where they were taken in at once. The invoices sent with the goods were always addressed in the same way. *Blenkarn* sold the goods, thus fraudulently ob-

tained from Messrs. *Lindsay*, to different persons, and among the rest he sold 250 dozen of cambric handkerchiefs to the Messrs. *Cundy*, who were *bona fide* purchasers, and who resold them in the ordinary way of their trade. Payment not being made, an action was commenced in the Mayor's Court of London by Messrs. *Lindsay* the junior partner of which firm, Mr. *Thompson*, made the ordinary affidavit of debt, as against *Alfred Blenkarn*, and therein named *Alfred Blenkarn* as the debtor. *Blenkarn's* fraud was soon discovered, and he was prosecuted at the Central Criminal Court, and convicted and sentenced. Messrs. *Lindsay* then brought an action against Messrs. *Cundy* as for unlawful conversion of the handkerchiefs. The cause was tried before Mr. Justice *Blackburn*, who left it to the jury to consider whether *Alfred Blenkarn*, with a fraudulent intent to induce the Plaintiffs to give him the credit belonging to the good character of *Blenkiron & Co.*, wrote the letters, and by fraud induced the Plaintiffs to send the goods to 37, *Wood Street*—were they the same goods as those bought by the Defendants—and did the Plaintiffs by the affidavit of debt intend, as a matter of fact, to adopt *Alfred Blenkarn* as their debtor. The first and second questions were answered in the affirmative, and the third in the negative. A verdict was taken for the Defendants, with leave reserved to move to enter the verdict for the Plaintiffs. On motion accordingly, the Court, after argument, ordered the rule for entering judgment for the Plaintiffs to be discharged, and directed judgment to be entered for the Defendants (1 Q. B. D. 348). On appeal, this decision was reversed and judgment ordered to be entered for the Plaintiffs, Messrs. *Lindsay* (2 Q. B. D. 96). This appeal was then brought.

THE LORD CHANCELLOR (Lord *Cairns*).—My Lords, you have in this case to discharge a duty which is always a disagreeable one for any Court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall. My Lords, in discharging that duty your Lordships can do no more than apply, rigorously, the settled and well-known rules of law. Now, with regard to the title to personal property, the settled and well-known rules of law may, I take it, be thus expressed: by the law of our country the purchaser of a chattel

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takes the chattel as a general rule subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced.

My Lords, the question, therefore, in the present case, as your Lordships will observe, really becomes the very short and simple one which I am about to state. Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs. *Lindsay* to *Alfred Blenkarn*? If there was any contract passing that property, even although, as I have said, that contract might afterwards be open to a process of reduction, upon the ground of fraud, still, in the meantime, *Blenkarn* might have conveyed a good title for valuable consideration to the present Appellants.

Now, my Lords, there are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods in question passed, it could only pass by way of contract; there is nothing else which could have passed the property. The second observation is this, your Lordships are not here embarrassed by any conflict of evidence, or any evidence whatever as to conversations or as to acts done, the whole history of the whole transaction lies upon paper. The

principal parties concerned, the Respondents and *Blenkarn*, never came in contact personally—everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of, was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case.

Now, my Lords, discharging that duty and answering that inquiry, what the jurors have found is in substance this : it is not necessary to spell out the words, because the substance of it is beyond all doubt. They have found that by the form of the signatures to the letters which were written by *Blenkarn*, by the mode in which his letters and his applications to the Respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was addressed by the Respondents ; that by all those means he led, and intended to lead, the Respondents to believe, and they did believe, that the person with whom they were communicating was not *Blenkarn*, the dishonest and irresponsible man, but was a well-known and solvent house of *Blenkiron & Co.*, doing business in the same street. My Lords, those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case.

If that is so, what is the consequence ? It is that *Blenkarn*—the dishonest man, as I call him—was acting here just in the same way as if he had forged the signature of *Blenkiron & Co.*, the respectable firm, to the applications for goods, and as if, when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to, and intended for, not himself but, the firm of *Blenkiron & Co.* Now, my Lords, stating the matter shortly in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the Respondents and *Blenkarn*, the dishonest man ? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time rested upon him, and as between him and them there was no *consensus* of mind which could lead to any agreement or any contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a

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contract, two sides would be required. With the firm of *Blenkiron & Co.* of course there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure.

The result, therefore, my Lords, is this, that your Lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterwards be impeached and set aside, on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case namely in which the contract never comes into existence. My Lords, that being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the Respondents, and the title which was attempted to be given to the Appellants was a title which could not be given to them.

My Lords, I therefore move your Lordships that this appeal be dismissed with costs, and the judgment of the Court of Appeal affirmed.

LORD HATHERLEY.—My Lords, I have come to the same conclusion as that which has just been expressed by my noble and learned friend on the woolsack. The real question we have to consider here, is this: whether or not any contract was actually entered into between the Respondents and a person named *Alfred Blenkarn*, who imposed upon them in the manner described in the verdict of the jury; the case that was tried being one as between the alleged vendors and a person who had purchased from *Alfred Blenkarn*.

Now the case is simply this, as put by the learned Judge in the Court below; it was most carefully stated, as one might expect it would be by that learned Judge: 'Is it made out to your satisfaction that *Alfred Blenkarn*, with a fraudulent intent to induce customers generally, and Mr. *Thomson* in particular, to give him the credit of the good character which belonged to *William Blenkiron & Sons*, wrote those letters in the way you have heard, and had those invoices headed as you have heard,' and farther than that, 'did he actually by that fraud induce Mr. *Thomson* to send the goods to 37, *Wood Street?*'

Both these questions were answered in the affirmative by the jury. What, then, was the result? It was, that there were

letters written by a man endeavouring by contrivance and fraud, as appears upon the face of the letters themselves, to obtain the credit of the well-known firm of *Blenkiron & Co., Wood Street.* That was done by a falsification of the signature of the *Blenkirons*, writing his own name in such a manner as that it appeared to represent the signature of that firm. And farther, his letters and invoices were headed '*Wood Street*,' which was not an accurate way of heading them; for he occupied only a room on a third floor, looking into *Little Love Lane* on one side, and looking into *Wood Street* on the other. He headed them in that way, in order that by these two devices he might represent himself to the Respondents as *Blenkiron* of *Wood Street.* He did that purposely; and it is found that he induced the Respondents by that device to send the goods to *Blenkiron* of *Wood Street.* I apprehend, therefore, that if there could be said to have been any sale at all, it failed for want of a purchaser. The sale, if made out upon such a transaction as this, would have been a sale to the *Blenkirons* of *Wood Street*, if they had chosen to adopt it, and to no other person whatever—not to this *Alfred Blenkarn*, with whom the Respondents had not, and with whom they did not wish to have, any dealings whatever.

My Lords, it appears to me that that brings the case completely within the authority of *Hardman* v. *Booth* (1 H. & C. 803), where it was held that there was no real contract between the parties by whom the goods were delivered and the concoctor of the fraud who obtained possession of them, because they were not *to him* sold. Exactly in the same way here, there was no real contract whatever with *Alfred Blenkarn*; no goods had been delivered to anybody except for the purpose of transferring the property to *Blenkiron* (not *Blenkarn*); therefore the case really in substance is the identical case of *Hardman* v. *Booth* (1 H. & C. 803) over again.

My noble and learned friend who sits opposite to me (Lord *Penzance*) has called my attention to a case which seems to have been decided on exactly the same principle as *Hardman* v. *Booth* (1 H. & C. 803), and it is worth while referring to it as an additional authority upon that principle of law. It is the case of *Higgons* v. *Burton* (26 L. J. (Ex.) 342). There, one *Dix*, who had been the agent of a responsible firm that had had dealings with the Plaintiff

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in the action, was dismissed by his employers ; he concealed that dismissal from a customer of the firm, the Plaintiff in the action, and, having concealed that dismissal, continued to obtain goods from him still as acting for the firm. The goods were delivered to him, but it was held that that delivery was not a delivery to any person whatever who had purchased the goods. The goods, if they had been purchased at all, would have been purchased by the firm for which this man had acted as agent ; but he had been dismissed from the agency—there was no contract, therefore, with the firm ; there was no contract ever intended between the vendors of the goods and the person who had professed to purchase the goods as the agent of that firm ; and the consequence was that there was no contract at all. There, as here, the circumstance occurred that an innocent person purchasing the goods from the person with whom there was no contract was obliged to submit to his loss. The point of the case is put so very shortly by Chief Baron *Pollock*, that I cannot do better than adopt his reasoning : ' There was no sale at all, but a mere obtaining of goods by false pretences ; the property, therefore, did not pass out of the Plaintiffs.' The other Judges, who were Barons *Martin*, *Bramwell*, and *Watson*, concurred in that judgment.

Here, I say, exactly as in those cases of *Hardman* v. *Booth* (1 H. & C. 803), and *Higgons* v. *Burton* (26 L. J. (Ex.) 342), there was no sale at all ; there was a representation, a false representation, made by *Blenkarn*, by which he got goods sent to him, upon applications from him to become a purchaser, but upon invoices made out to the firm of *Blenkiron & Co.* But no contract was made with *Blenkarn*, nor any contract was made with *Blenkiron & Co.*, because they knew nothing at all about it, and therefore there could be no delivery of the goods with the intent to pass the property.

We have been pressed very much with an ingenious mode of putting the case on the part of the counsel who have argued with eminent ability for the Appellants in this case, namely, suppose this fraudulent person had gone himself to the firm from whom he wished to obtain the goods, and had represented that he was a member of one of the largest firms in *London*. Suppose on his making that representation the goods had been delivered to him. Now I am very far, at all events on the present occasion, from

seeing my way to this, that the goods being sold to him as representing that firm he could be treated in any other way than as an agent of that firm, or suppose he had said : ' I am as rich as that firm. I have transactions as large as those of that firm. I have a large balance at my bankers ; ' then the sale would have been a sale to a fraudulent purchaser on fraudulent representations, and a sale which would have been capable of being set aside, but still a sale would have been made to the person who made those false representations ; and the parting with the goods in that case might possibly—I say no more—have passed the property.

But this case is an entirely different one. The whole case, as represented here is this ; from beginning to end the Respondents believed they were dealing with *Blenkiron & Co.*, they made out their invoices to *Blenkiron & Co.*, they supposed they sold to *Blenkiron & Co.*, they never sold in any way to *Alfred Blenkarn* ; and therefore *Alfred Blenkarn* cannot, by so obtaining the goods, have by possibility made a good title to a purchaser, as against the owners of the goods, who had never in any shape or way parted with the property nor with anything more than the possession of it.

LORDS PENZANCE and GORDON agreed.

Judgment appealed from affirmed ; and appeal dismissed with costs.

INNOCENT MISREPRESENTATION

REDGRAVE v. HURD.

'It is undoubted law that where a vendor has procured the sale of his property by misrepresentation the purchaser can set aside the contract of purchase, prior to completion, even though the misrepresentation be innocent: see per Jessel, M.R., in *Redgrave* v. *Hurd* ((1881) 20 Ch. D. 1, 12); per Lord Bramwell and Lord Herschell in *Derry* v. *Peek* ((1889) 14 App. Cas. 337, 347, 359). But if the contract has been executed by the completion of a conveyance or lease, or the formal assignment of a chattel, then rescission cannot be obtained on the ground of innocent misrepresentation by the vendor or lessor. When the contract is so completed, fraud must be proved before rescission can be granted: see per Lord Campbell in *Wilde* v. *Gibson* ((1848) 1 H. L. C. 605, 632); *Seddon* v. *North Eastern Salt Co.* ([1905] 1 Ch. 326); and *Angel* v. *Jay* ([1911] 1 K. B. 666.'—Per McCardie, J., in *Armstrong* v. *Jackson* [1917] 2 K. B. at p. 825.

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IN January, 1880, the Plaintiff, a solicitor of *Birmingham*, inserted in the *Law Times* the following advertisement:—

'Law Partnership.—An elderly solicitor of moderate practice, with extensive connections in a very populous town in a midland county, contemplates shortly retiring, and having no successor would first take as partner an efficient lawyer and advocate about forty, who would not object to purchase advertiser's suburban residence, suitable for a family, value £1600, three-fourths of which might remain on security—no premium for business and introduction. A large field is here open for an efficient man, and great advantages for free education of sons. Address *R. J.*, No. 1919, 10 *Wellington Street, Strand.*'

The Defendant applied by letter to the address indicated, and a correspondence ensued, the negotiation proceeding on the footing that the Plaintiff should receive the Defendant as his partner and transfer to him a moiety of his practice and the Plaintiff's leasehold house for £1600. On the 12th of February the Plaintiff and Defendant had two interviews, at the latter of which the Defendant's wife was present. There was a direct conflict of evidence as to what passed at these interviews, the Plaintiff

asserting that he stated the business to bring him in about £200 a year, the Defendant and his wife saying that the Plaintiff stated it to bring in from £300 to £400 a year. The parties were examined orally in Court, and Mr. Justice *Fry* held that greater weight was to be attributed to the evidence of the Defendant and his wife than to that of the Plaintiff, and held that the Plaintiff had either represented his business as bringing in about £300 a year, or from £300 to £400 a year.

On the 14th of February the Defendant wrote to the Plaintiff: 'Of course I should duly rely on your promise to do all you could to extend the business among your friends. Still I should be glad to have some idea as to the amount of business done at your office in the past three years and the nature of the nucleus with which we should start. Would you, therefore, be able to give me an hour next Tuesday to go into this matter and settle the terms of partnership?'

On Tuesday, the 17th of February, the parties accordingly had an interview at the Plaintiff's office. The Plaintiff produced to the Defendant three summaries of business done in 1877, 1878, 1879. These summaries shewed gross receipts not quite amounting to £200 in a year. The Defendant asked how the difference was made up, and the Plaintiff shewed him a quantity of letters and papers which he stated to relate to other business which he had done. No books of account were produced, the Plaintiff not having kept any books which shewed the amount of his business, but the Plaintiff shewed the Defendant some letter-books and diaries and a day-book. The Defendant did not examine any of the books, letters, and papers thus produced, but only looked cursorily at them, and ultimately agreed to purchase the house and take a share in the business for £1600. Mr. Justice *Fry* came to the conclusion that if the letters and papers to which the Plaintiff referred had been examined they would only have shewn business to the amount of £5 or £6 a year. The Defendant wished the written agreement to set out that the £1600 was the consideration for the purchase both of the house and the share in the practice, but the Plaintiff refused to assent to this, and an agreement was drawn up and signed on the 2nd of March, 1880, by which the Defendant agreed to purchase the house for £1600, the practice not being referred to. The Defendant paid a deposit of

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£100, and on the 17th of April, 1880, was let into possession of the house, and removed thither with his family from *Stroud*; but finding, as he alleged, that the practice was utterly worthless, he gave up possession, and refused to complete the purchase. The Plaintiff, in June, 1880, commenced an action for specific performance of the written agreement to purchase the house.

The Defendant by his statement of defence admitted the signature of the agreement, but alleged that it was not binding on him for the reasons thereinafter mentioned. He then (par. 2) stated the advertisement, and alleged (par. 3) that the Defendant entered into correspondence with the Plaintiff with reference to it, and that it was arranged between them that the Plaintiff should receive the Defendant as his partner, and transfer to him a moiety of a moderate law practice which the Plaintiff stated that he possessed, together with the leasehold house, the Defendant agreeing to pay as consideration for the transfer both of the share in the practice and of the house the sum of £1600; (par. 4) that the Defendant requested the Plaintiff that the facts stated in par. 3 should be set out in the written agreement between the parties in order that it might appear that the payment by the Defendant of the £1600 was a consideration for the transfer of the leasehold house and the share in the law practice, but that the Plaintiff refused, 'and the Defendant, for reasons appearing in the next paragraph, now alleges that in such refusal the Plaintiff was actuated by a fraudulent intention.' (5) 'Shortly after the partnership between the Plaintiff and the Defendant had been entered into in pursuance of the agreement thereto, the Defendant discovered that the said law practice was utterly worthless, and that the representations made in regard thereto by the Plaintiff were false; and the Defendant says that the Plaintiff made such false representations for the purpose of inducing him, the Defendant, to enter into the contract for the purchase of the said partnership.' The Defendant then proceeded to allege that certain misrepresentations had been made to him about the house. He then proceeded: 'By way of counter-claim the Defendant relies upon the facts stated in his defence as though they were again repeated, and claims' to have the contract rescinded and the deposit of £100 returned to him, £100 damages for the Defendant's loss and trouble in removing from *Stroud* to *Birmingham*, £200

damages for having given up his practice at *Stroud*, and for further relief.

The Plaintiff by his reply submitted that the agreement for purchase was binding on the Defendant wholly irrespective of any arrangement in reference to the partnership ; and that even if that were not so the Plaintiff had always been ready to carry out the agreement for a partnership, and that the allegations as to fraud and misrepresentation were untrue. He denied that the £1600, or any part thereof, was a consideration for the transfer of the share in the law practice. He admitted that he refused to enter into an agreement by which the £1600 should be in part a consideration for the purchase of a share in the law practice, and declined to sell the house for anything less than £1600, but said that it was wholly untrue that in such refusal he was actuated by any fraudulent intention. He denied having made any false representations as to his business.

[FRY, J., gave judgment for the specific performance of the contract with costs and dismissed the counterclaim with costs. The defendant appealed.]

JESSEL, M.R.—This is an appeal from a decision of Mr. Justice *Fry*, granting specific performance of a contract by the Defendant to buy a house from the Plaintiff, and dismissing with costs a counterclaim by the Defendant asking to rescind the contract, and also asking for damages on the ground of deceit practised by the Plaintiff in respect to the agreement.

As regards the Defendant's counter-claim, we consider that it fails so far as damages are concerned, because he has not pleaded knowledge on the part of the Plaintiff that the allegations made by the Plaintiff were untrue, nor has he pleaded the allegations themselves in sufficient detail to found an action for deceit. It only remains to consider the claim of the Plaintiff for specific performance, and so much of the counter-claim of the Defendant as asks to have the contract rescinded.

Before going into the details of the case I wish to say something about my view of the law applicable to it, because in the text-books, and even in some observations of noble Lords in the House of Lords, there are remarks which I think, according to the course of modern decisions, are not well founded, and do not

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accurately state the law. As regards the rescission of a contract, there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of Common Law—a difference which of course has now disappeared by the operation of the *Judicature Act*, which makes the rules of equity prevail. According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, 'A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it.' The other way of putting it was this: 'Even assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to seek to take advantage of his own false statements.' The rule in equity was settled, and it does not matter on which of the two grounds it was rested. As regards the rule of Common Law there is no doubt it was not quite so wide. There were, indeed, cases in which, even at Common Law, a contract could be rescinded for misrepresentation, although it could not be shewn that the person making it knew the representation to be false. They are variously stated, but I think, according to the later decisions, the statement must have been made recklessly and without care, whether it was true or false, and not with the belief that it was true.[1] But, as I have said, the doctrine in equity was settled beyond controversy, and it is enough to refer to the judgment of Lord *Cairns* in the *Reese River Silver Mining Company* v. *Smith* (Law Rep. 4 H. L. 64), in which he lays it down in the way which I have stated.

[1] Speaking of this statement, Bowen, L.J., in *Newbigging* v. *Adam* (1886) 34 Ch. D. at p. 594 says: 'With great respect for the shadow and memory of that great name I cannot help saying that this is not a perfect exposition of what the common law was, but, so far as the rule of equity goes, I must assume that the Master of the Rolls spoke with full knowledge of the equity authorities.' [Edd.]

There is another proposition of law of very great importance which I think it is necessary for me to state, because, with great deference to the very learned Judge from whom this appeal comes, I think it is not quite accurately stated in his judgment. If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.' I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the *Statute of Limitations*. That, of course, is quite a different thing. Under the statute delay deprives a man of his right to rescind on the ground of fraud, and the only question to be considered is from what time the delay is to be reckoned. It had been decided, and the rule was adopted by the statute, that the delay counts from the time when by due diligence the fraud might have been discovered. Nothing can be plainer, I take it, on the authorities in equity than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence. One of the most familiar instances in modern times is where men issue a prospectus in which they make false statements of the contracts made before the formation of a company, and then say that the contracts themselves may be inspected at the offices of the solicitors. It has always been held that those who accepted those false statements as true were not deprived of their remedy merely because they neglected to go and look at the contracts. Another instance with which we are familiar is where a vendor makes a false statement as to the contents of a lease, as, for instance, that it contains no covenant preventing the carrying on of the trade which the purchaser is known by the vendor to be desirious of carrying on upon the property. Although the lease itself might be produced at the sale, or might have been open to the inspection of the purchaser long previously to the sale, it has been repeatedly held that the vendor cannot be allowed to say, 'You were not entitled to give credit to my statement.' It is not sufficient, therefore, to say that the purchaser had the opportunity of

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investigating the real state of the case, but did not avail himself of that opportunity. It has been apparently supposed by the learned Judge in the Court below that the case of *Attwood* v. *Small* (6 Cl. & F. 232) conflicts with that proposition. He says this: 'He inquired into it to a certain extent, and if he did that carelessly and inefficiently it is his own fault. As in *Attwood* v. *Small*, those directors and agents of the company who made ineffectual inquiry into the business which was to be sold to the company were nevertheless held by their investigation to have bound the company, so here, I think, the Defendant who made a cursory investigation into the position of things on the 17th of February must be taken to have accepted the statements which were in those papers.' I think that those remarks are inaccurate in law, and are not borne out by the case to which the learned Judge referred. Of course where you have five Lords giving independent reasons, it is very difficult to ascertain with accuracy the ground upon which the House of Lords decided, but I think that in all such cases you must only look at the judgments of the majority who decided the case, for the reasons to be found in their judgments must be either wholly or to some extent the reasons which guided the House of Lords in coming to their conclusion. I therefore confine myself for this purpose to the opinions of the three Lords who decided the case in favour of the Appellants. The first opinion is that of Earl *Devon*, who had been a Master in Chancery, and although of course his opinion is entitled to great respect, yet I do not attach so much importance to it as I do to that of Lord *Cottenham*. His Lordship says (6 Cl. & F. 344): 'The question is not as to waiver or acquiescence in fraud, but whether the parties have used that ordinary degree of vigilance and circumspection in order to protect themselves which the law has a right to expect from those who apply for its aid.' In that sentence I think he is not quite correct as regards the law, but the ground of his judgment is this: 'The whole course of the proceeding from its commencement to its close tends to shew that the purchasers did not rely upon any statements made to them, but resolved to examine and judge for themselves.' Now, that is a good ground if borne out by the evidence. It is a different ground from that taken by the other Lords, but it cannot be objected to in point of law.

I now turn to the judgment of Lord Chancellor *Cottenham*, who says (6 Cl. & F. 393), 'We are now trying two propositions by this evidence, first, whether fraud was practised; and, secondly whether that which is alleged as fraud, or rather the facts from which fraud is inferred, were not known to the Plaintiffs, or to those by whose conduct and by whose knowledge they must be affected from the very commencement of this transaction. I have satisfied myself that both these propositions are in favour of the Defendant;' that is, he found not only no fraud, but he also found that all the material facts were known before they entered into the contract. 'I do not find the fact of fraud made out, although undoubtedly it may be supposed that the bargain was a very good one for Mr. *Attwood*. That is not the matter in question, but that the fraud alleged, which alone can be resorted to for the purpose of supporting the Plaintiff's case, is not made out in fact, and that the circumstances from which that fraud is endeavoured to be inferred by the Plaintiffs, are, in my opinion, proved to have been known to them from the beginning.' Those are the two grounds of his judgment, and neither of them is anything like the proposition to be found in the judgment of Mr. Justice *Fry*, that if cursory or ineffectual attempts are made by the agents of the person defrauded to discover the real facts he loses his right to complain of the fraud. There is a sentence in Earl *Devon's* judgment to that effect, but not in Lord *Cottenham's*.

The only other judgment which was in favour of the appeal was a very long judgment of Lord *Brougham*, which I shall not read through, but at p. 497 we find his conclusion: 'My Lords, when we apply to this case the principles which I stated at the outset, we find the facts are wanting; we find there is no misrepresentation which gave rise to the contract' (that is, he concurs with Lord *Cottenham* that there is no fraud—that is the first ground). 'We find that the purchasers did not rely upon the representation, but said, We will inquire ourselves'—that is the second ground; it is the same as Lord *Devon's* ground, and also would be a good answer, though it was not taken by Lord *Cottenham*. Then he goes on: 'From the 6th of June, 1825, downwards, they constantly proceeded upon the plan of satisfying themselves, first by sending their agents, then by going down themselves, then by inquiring themselves, then even afterwards

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by sending other agents to inquire, and those agents reporting that the representation was true, and that those parties finding by their own inquiries' (not as Mr. Justice *Fry* puts it, 'the imperfect inquiries of agents') 'that the agents had reported accurately, and that the representation was corroborated by the result of the inquiry, and that even when their own interest, when everything in the commercial world was down, when shares were falling, when money was not to be had, when they were asking time for a prolongation of the term of payment to Mr. *Attwood*, and when it was their interest to discover a flaw in the contract, they then inquire again and send a new agent to inquire, Mr. *Foster*, an engineer, and they state to him their own opinion to be in favour of Mr. *Attwood's* representations; and Mr. *Foster*, in answer as late as the 26th of April, less than a month before the bill was put upon the file, reports in favour of Mr. *Attwood's* representations. Such being the facts, even if no observation arose as to the delay, as to the adoption and affirmance of the contract, purging it of all objections which might be made, and supposing that they had come in time, instead of delaying so many months; then I ask myself this question, In these circumstances have these parties a right to be released from their contract by the interposition of a Court of Equity, according to those principles which I have stated? When I ask myself that question upon which alone my judgment must turn, I am bound to say No.' So that the two grounds taken by Lord *Brougham* are that there was no misrepresentation, and that the purchasers did not rely on the representations. He agreed in one with Lord *Cottenham* and in the other with Lord *Devon*. The three grounds taken by the three noble Lords, one of which grounds was taken by one only of the Lords, and each of the others by two, were that there was no fraud—that there was actual knowledge of the facts before the contract, and that no reliance was placed upon the representation. In no way, as it appears to me, does the decision, or any of the grounds of decision, in *Attwood* v. *Small* (6 Cl. & F. 232), support the proposition that it is a good defence to an action for rescission of a contract on the ground of fraud that the man who comes to set aside the contract inquired to a certain extent, but did it carelessly and inefficiently, and would, if he had used reasonable diligence, have discovered the fraud.

As regards the facts of this case, I agree with the conclusions of Mr. Justice *Fry* on every point but one, and my failure to agree with him in that one is the cause of my concurring in reversing his decision. What he finds in effect is that the Defendant *Hurd* was induced to enter into the contract by a material misrepresentation made to him by the Plaintiff *Redgrave*, but he comes to the conclusion that either he did not finally rely upon that representation, or that if he did rely upon it he made an inquiry which, although ineffectual and made, as he says, carelessly and inefficiently, bound him in a Court of Equity, and prevented him from saying that he relied on the representation. I have already dealt with that as a matter of law, and I will deal with it presently as a matter of fact, because I think there was an omission to notice a most material fact, or rather, I should say, an omission to give sufficient weight to it, for it is noticed in the judgment which is now appealed from.

Now the facts to my mind are clear, and I am glad to say, with one exception, they are in writing. The Plaintiff *Redgrave* advertised in the *Law Times* for a law partnership. The *Law Times* is not a publication in which people ordinarily advertise for the sale of a house, but is one in which they do advertise for partners in law partnerships. [His Lordship then read the advertisement.] That means this: 'There is a moderate practice, I shall not take a premium for it if you will take my house off my hands;' that is, the purchase of the house is the consideration for giving him the partnership in the moderate business. A man issuing such an advertisement cannot be heard to say that he had no business worth mentioning to sell. I agree that his main object was to get rid of the house, and that he had little else to dispose of. It appears on his own evidence that his gross business was £200 a year, what its nett value was I am unable to say, but I should think £100 a year a very high estimate of its nett value. He says by the advertisement that he is elderly and has no successor, which implies that there is a succession to something of some value. He says it is 'a moderate practice with extensive connection,' which is not a truthful description of a practice such as I have mentioned, a practice which would give £50 a year nett to each of the two partners. We start then with an advertisement containing a misrepresentation, and as far as I can see, of

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facts within the advertiser's own knowledge, for he does not pretend to say that he did not know that his business had a gross value of only £200 a year ; on the contrary, he says in his evidence that he told the Defendant so.

Interviews then took place. The first interview was on the 12th of February. There is a conflict of evidence as to what passed at that interview, and the learned Judge below gave credit to the evidence of *Hurd* and his wife that *Redgrave* stated his practice to be between £300 and £400 a year. Having regard to the advertisement, it is most probable that he did make some such statement, for he had made representations in the advertisement which were inconsistent with its amounting only to £200 a year. But I do not rely on that. The rule of the Court of Appeal is that when there is direct conflicting oral testimony, and the Judge who has seen the witnesses believes one party and disbelieves the other, this Court, not having seen the witnesses, cannot disturb that decision any more than it could disturb the verdict of a jury under similar circumstances. We must, therefore, take it as a fact that *Redgrave* represented to *Hurd* on the 12th of February that his business was worth about £300 a year, or between £300 and £400 a year, it does not matter which.

Another interview took place between the Plaintiff and the Defendant on the 17th of February. Before proceeding to what is said by the learned Judge as to what took place on the 17th of February, I will refer to the observations which he made just before. ' Then comes, in the second place, this very material inquiry. Did the Defendant purchase the house and go on with the negotiations upon the footing and upon the faith of that representation so made by the Plaintiff ' (that is, the representation made on the 12th of February) ? ' I have come to the conclusion that he did not. I think that the letter of the 14th of February is worthy of all the weight which has been attributed to it by the Plaintiff's counsel. The Defendant in that letter says this : " While relying on your effort to extend the business among your connection, I feel I should like to have some idea of the amount of business done at your office during the past three years, and the nature of the nucleus with which we should start." ' Now to my mind that means this : ' You have told me you are making between £300 and £400 a year, but I should like

to know what is the average of the past three years. What you are making for one year is not sufficient for me.' Therefore, the Defendant does not rely exclusively on the statement of the £300 a year because he wants further information, but he does not give up the reliance on the statement. 'Accepting your statement that you are making £300 a year, tell me what you made during the last three years.' That that is the true meaning of the letter is, I think, shewn by the nature of the documents produced on the 17th of February to the Defendant by the Plaintiff: 'The Defendant does, by the Plaintiff's invitation, visit him on the 17th of February, and then and there are produced to the Defendant by the Plaintiff the papers which relate respectively to the years 1877 1878, and 1879, which have sometimes been called bills of costs, and sometimes called estimates, and they shew, roughly speaking, a gross amount of business done to the extent of about £200 a year. Then the common case of the Plaintiff and the Defendant is that in answer to an inquiry from the Defendant, the Plaintiff said there was other business which was not entered upon those papers.' Now that inquiry as I understand it was this, 'You were doing £300 a year, you shew in those papers only £200 a year, where is the rest?' And the answer was, 'Oh, there is a lot of papers here containing business which will account for the rest.' Well, it appears to me, that that being the common case of both parties, it shews that *Hurd*, though still relying on the representation that the business was at least £300 a year, when he found that the papers shewed only a gross £200 a year, wanted to know where the business was that made up the £300 a year, and he is told, 'Oh there are a lot of papers there; I have not made out my bills of costs fully, but you will find the business if you look through those papers;' but he did not look through them. The learned Judge continues: 'I cannot attribute much weight to that other business, and for this reason, that in my judgment if the Defendant had meant to rely upon this extraneous business, which was not mentioned in the papers, he would have made some inquiry about it.' I am sorry to say I differ from every word of that. The Defendant did make an inquiry. All that the Plaintiff had prepared for him were these summaries. He says, 'Where is the rest of the business?' 'Oh it is in that parcel of papers.' How could the

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Defendant make out bills of costs from the parcel of papers? he could do nothing but rely on the Plaintiff's statement that the parcel of papers did contain the business. Then the learned Judge goes on to say: 'According to the conclusion which I come to upon the evidence, the books were there before the Defendant, and although he did not trouble to look into them he had the opportunity of doing so. In my judgment if he had intended to rely upon that parol representation of business beyond that which appeared in the papers, having the materials before him, he would have made some inquiry into it. But he did nothing of the sort.' Now in that respect I am sorry to say that the learned Judge was not correct. There were no books which shewed the business done. The Plaintiff did not keep any such books, and had nothing but his diaries, and some letter books; and therefore, it is a mistake to suppose that there were any books before the Defendant which he could look into to ascertain the correctness of the statements made by the Plaintiff; and the whole foundation of the judgment on this part of the case, even if it had been well founded in law, fails in fact, because the Defendant was not guilty of negligence in not doing that which it was impossible to do, no books being in existence which would shew the amount of business done. Then the learned Judge continues: 'He did nothing of the sort: I think the true result of the evidence is this, that the Defendant thought that if he could have even such a nucleus of business as these papers disclosed, he could by the energy and skill which he possessed make himself a good business in *Birmingham*.' Then that being so the learned Judge came to the conclusion either that the Defendant did not rely on the statement, or that if he did rely upon it he had shewn such negligence as to deprive him of his title to relief from this Court. As I have already said, the latter proposition is in my opinion not founded in law, and the former part is not founded in fact; I think also it is not founded in law, for when a person makes a material representation to another to induce him to enter into a contract, and the other enters into that contract, it is not sufficient to say that the party to whom the representation is made does not prove that he entered into the contract, relying upon the representation. If it is a material representation calculated to induce him to enter into contract, it is an inference

of law [1] that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shewn either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or shewed clearly by his conduct, that he did not rely on the representation. If you tell a man, ' You may enter into partnership with me, my business is bringing in between £300 and £400 a year,' the man who makes that representation must know that it is a material inducement to the other to enter into the partnership, and you cannot investigate as to whether it was more or less probable that the inducement would operate on the mind of the party to whom the representation was made. Where you have neither evidence that he knew facts to shew that the statement was untrue, or that he said or did anything to shew that he did not actually rely upon the statement, the inference remains that he did so rely, and the statement being a material statement, its being untrue is a sufficient ground for rescinding the contract. For these reasons I am of opinion that the judgment of the learned Judge must be reversed and the appeal allowed.

As regards the form of the judgment, as the appellant succeeds on the counter-claim, I think it would be safer to make an order both in the action and the counter-claim, rescinding the contract and ordering the deposit to be returned. As I have already said, it is not a case in which damages should be given.

BAGGALLAY and LUSH, L.JJ., delivered judgments to the same effect.

Appeal allowed.

[1] ' I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. In *Redgrave* v. *Hurd* the late Master of the Rolls is reported to have said it was an inference of law. If he really meant this he retracts it in his observations in the present case. I think it not possible to maintain that it is an inference of law.'—Per Lord Blackburn in *Smith* v. *Chadwick* (1884) 9 App. Cas. at p. 196. [Edd.]

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'A statement may form part of a contract which the party making it promises to be true, or it may be an innocent representation of fact which he does not promise to be true, but which, if it was untrue in a material particular, and formed part of the inducement to enter into the contract, may give rise to a claim to rescind, but does not give rise to a claim for damages. It is a question of intention whether a representation amounts to a warranty.'—Per Scrutton, L.J., in *Harrison* v. *Knowles and Foster* [1918] 1 K. B. at p. 610.

'There is no necessity that the word "warrant" or "promise" should occur in the bargain. That was decided in *Cave* v. *Coleman*, 3 M. & R. 2, where it was held that a verbal representation by the seller to the buyer, in the course of dealing, that he "may depend upon it the horse is perfectly quiet and free from vice", is a warranty. Nor is it necessary that the statement or representation should be simultaneous with the close of the bargain: if it be part of the contract, it matters not at what period of the negotiation it is made.'—Per Jervis, C.J., in *Hopkins* v. *Tanqueray* (1854) 15 C. B. at p. 137.

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Appeal from an order of the Court of Appeal affirming a judgment of Lush J.

The action was brought by the respondent against the appellants, originally for damages for false and fraudulent representation whereby the respondent was induced to purchase 6000 shares in a company called the Filisola Rubber and Produce Estates, Limited, but by his statement of claim the respondent added an alternative claim for damages for breach of warranty, the alleged warranty being that the company was a rubber company the main object of which was to produce rubber. This appeal is concerned with the question of warranty only.

The action was tried before Lush J. and a special jury at the Liverpool Assizes.

The Filisola Rubber and Produce Estates, Limited, was promoted by Cayley, Greyel & Co. and was registered by them on April 16, 1910, with a nominal capital of 120,000*l.* divided into 1,200,000 shares of 2*s.* each.

Before its registration the appellants, by Mr. Reimers, a partner in the firm, agreed with the promoters to underwrite 360,000 shares in the company.

The appellants were rubber merchants of high standing, carrying on business in London, with branches at Liverpool and elsewhere.

On April 11, 1910, the appellants instructed their Liverpool manager, J. Dudley Johnston, to ask some of his Liverpool friends to take shares in the company. Johnston had been shewn a draft prospectus of the company by Reimers, but at this time he had no copies of the prospectus, nor did he receive any till April 16. Johnston sold a large number of shares, and he mentioned the company to (among other people) a Mr. Wright, who usually acted as broker for the respondent.

On April 14 the respondent, who was then in Wright's office, rang up Johnston on the telephone. The account given by the respondent in his evidence in chief of the conversation which then took place was accepted as correct by the appellants and was as follows :—

'I said "Is that you Johnston?" He said "Yes." I said "I understand you are bringing out a rubber company," and he said "We are." I asked him if he had any prospectuses, and he said "No." I then asked him if it was all right, and he said "We are bringing it out." I then replied "That is good enough for me." . . . I then asked him how many shares I could have. He asked me how many I wanted and I said I would take almost any number. . . . He said "I think I can let you have 5000, but the premium is 1*s.* 3*d.*" I then said that was all right, that I would take them.' The respondent added that the reason why he was willing to take almost any number of shares was because the position the appellants occupied in the rubber trade was of such high standing that any company they should see fit to bring out was a sufficient warranty to him that it was all right in every respect.

Later on the same day the respondent again rang up Johnston and asked him if he had any more shares to sell. Johnston said that he had, but that the premium was 1*s.* 6*d.* The respondent replied that he wanted another thousand and would take them at that price. These arrangements were confirmed by two letters of April 15 written by the appellants to the respondent from their Liverpool office. The first letter related to the 5000 shares and the second to the 1000. They were both (mutatis mutandis) in the same form. The first letter was as follows :—

'Dear Sir

'We beg to confirm the arrangement we have made with you to secure the allotment to you of 5000 shares in the Filisola

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Rubber and Produce Estates in consideration of a premium of 1*s.* 3*d.* per share to be paid to us.

'Yours truly

'Heilbut, Symons & Co.'

The shares were shortly afterwards allotted to the respondent. At this time the rubber boom was at its height, and for a short period the shares of this company were at a premium. It was subsequently discovered that of the rubber trees stated in the prospectus as existing 15,000 had been damaged by natives and 30,000 could not be found, with the result that the shares fell in value and were at the time of the trial practically valueless.

The questions submitted by the learned judge to the jury, with their answers thereto, were :

'(1.) Was the Filisola Company a company which could be properly described as a rubber company ?—No.

'(2.) Did Mr. Reimers or Mr. Johnston or both fraudulently represent that the Filisola Company was a rubber company ?—No.

'(3.) Did Mr. Reimers or Mr. Johnston or both warrant that the Filisola Company was a rubber company ?—Yes.'

Thereupon the learned judge entered judgment for the respondent for 406*l.* 5*s.*, the agreed amount of damages, and costs.

The appellants appealed to the Court of Appeal and asked for judgment or a new trial on the grounds, in effect, (1.) that there was no evidence on which the jury could properly find that the appellants gave any such warranty as alleged ; (2.) that there was no evidence on which the jury could properly find that the Filisola Company could not properly be described as a rubber company ; and (3.), alternatively, that the verdict on both these issues was against the weight of evidence.

The Court (Lord Alverstone C.J., Vaughan Williams and Farwell L.JJ.) dismissed the appeal.

LORD MOULTON.—My Lords, in this action the plaintiff sought relief in damages against the defendants in respect of two contracts whereby the defendants undertook to procure for the plaintiff, and the plaintiff undertook to accept, the allotment of 5000 and 1000 shares in a company called the Filisola Rubber and Produce Estates, Limited. The claim for such relief was mainly based on

the allegation that the plaintiff had been induced to enter into these contracts by the false and fraudulent representation of the defendants that the said company was a rubber company. This was the sole ground for relief which was put forward by the plaintiff in the proceedings before action and in the indorsement on the writ; but in the statement of claim an alternative claim for damages was included, based on the breach of an alleged warranty given by the defendants that the company was a rubber company.

At the trial the substantial case which was sought to be made on behalf of the plaintiff had reference solely to the alleged false and fraudulent representation. Evidence was given by the plaintiff and not challenged by the defendants as to a conversation which took place over the telephone between the plaintiff and Mr. Johnston, a representative of the defendants, in which undoubtedly Mr. Johnston stated that the company was a rubber company. The making of the alleged representation was therefore not in issue, and the whole of the evidence on both sides was directed to the issue whether such representation was false, and whether, if so, it was fraudulently made. No evidence was given upon the issue of a warranty having been given by the defendants that the company was a rubber company other than so far as the proof of the conversation above referred to may have amounted to such evidence.

In answer to questions put to them by the judge, the jury found (1.) that the company could not properly be described as a rubber company; (2.) that the defendants did not fraudulently represent, but that (3.) they did warrant that it was a rubber company. Against the second of these findings there is no appeal, so that the only questions before us are as to whether the first and third of these findings can stand.

The alleged warranty rested entirely upon the following evidence. The plaintiff got a friend to ring up on the telephone Mr. Johnston (a representative of the defendants, for whose acts they accept the full responsibility) to tell him that the plaintiff wished to speak to him. The plaintiff's evidence continues thus: 'I went to the telephone and I said "Is that you, Johnston?" He said "Yes." I said "I understand that you are bringing out a rubber company," and he said "We are."'

The material part of the evidence ends here. The further

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conversation related to the soundness of the company, but no claim for relief is based on what then passed either by way of fraudulent representation or warranty.

The plaintiff then asked if he could have some shares. Mr. Johnston said he thought he could let him have 5000 at a premium of 1*s.* 3*d.*, which the plaintiff expressed himself ready to take, but no bargain was then concluded. On the next day, however, Mr. Johnston accepted in writing the offer of the plaintiff as to taking 5000 shares. Later on the plaintiff applied to Mr. Johnston for a further 1000 shares and obtained them at a somewhat higher premium. In each case the terms of the contract were reduced to writing by Mr. Johnston, acting for the defendants, and sent to the plaintiff. The contracts were not contracts of sale of the shares of the company (which had not then been issued), but contracts whereby the defendants (who were underwriters of the shares in the forthcoming issue) undertook to procure for the plaintiff the allotment of the shares on his applying for them. There is, of course, no conflict as to the actual terms of these contracts, which appear from the letters. They were acted upon by the plaintiff, who duly applied for and received the allotments of 5000 and 1000 shares of the company, such allotments having been procured by the defendants by the exercise of their rights as underwriters. The plaintiff parted with some of his shares but retained the remainder, and it is in respect of these latter that the damages are claimed in this action.

There is no controversy between the parties as to certain points of fact and of law. It is not contested that the only company referred to was the Filisola Rubber and Produce Estates, Limited, or that the reply of Mr. Johnston to the plaintiff's question over the telephone was a representation by the defendants that the company was a 'rubber company,' whatever may be the meaning of that phrase; nor is there any controversy as to the legal nature of that which the plaintiff must establish. He must shew a warranty, i. e., a contract collateral to the main contract to take the shares, whereby the defendants in consideration of the plaintiff taking the shares promised that the company itself was a rubber company. The question in issue is whether there was any evidence that such a contract was made between the parties.

It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by 100*l.*, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them, and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter.

There is in the present case an entire absence of any evidence to support the existence of such a collateral contract. The statement of Mr. Johnston in answer to plaintiff's question was beyond controversy a mere statement of fact, for it was in reply to a question for information and nothing more. No doubt it was a representation as to fact, and indeed it was the actual representation upon which the main case of the plaintiff rested. It was this representation which he alleged to have been false and fraudulent and which he alleged induced him to enter into the contracts and take the shares. There is no suggestion throughout the whole of his evidence that he regarded it as anything but a representation. Neither the plaintiff nor the defendants were asked any question or gave any evidence tending to shew the existence of any animus contrahendi other than as regards the main contracts. The whole case for the existence of a collateral

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contract therefore rests on the mere fact that the statement was made as to the character of the company, and if this is to be treated as evidence sufficient to establish the existence of a collateral contract of the kind alleged the same result must follow with regard to any other statement relating to the subject-matter of a contract made by a contracting party prior to its execution. This would negative entirely the firmly established rule that an innocent representation gives no right to damages. It would amount to saying that the making of any representation prior to a contract relating to its subject-matter is sufficient to establish the existence of a collateral contract that the statement is true and therefore to give a right to damages if such should not be the case.

In the history of English law we find many attempts to make persons responsible in damages by reason of innocent misrepresentations, and at times it has seemed as though the attempts would succeed. On the Chancery side of the Court the decisions favouring this view usually took the form of extending the scope of the action for deceit. There was a tendency to recognize the existence of what was sometimes called 'legal fraud,' i. e., that the making of an incorrect statement of fact without reasonable grounds, or of one which was inconsistent with information which the person had received or had the means of obtaining, entailed the same legal consequences as making it fraudulently. Such a doctrine would make a man liable for forgetfulness or mistake or even for honestly interpreting the facts known to him or drawing conclusions from them in a way which the Court did not think to be legally warranted. The high-water mark of these decisions is to be found in the judgment pronounced by the Court of Appeal in the case of *Peek* v. *Derry* ((1887) 37 Ch. D. 541; (1889) 14 App. Cas. 337), when they laid down that where a defendant has made a misstatement of fact and the Court is of opinion that he had no reasonable grounds for believing that it was true he may be made liable in an action of deceit if it has materially tended to induce the plaintiff to do an act by which he has incurred damage. But on appeal to your Lordships' House this decision was unanimously reversed, and it was definitely laid down that, in order to establish a cause of action sounding in damages for misrepresentation, the statement must be fraudulent or, what is equivalent thereto, must be made recklessly, not

caring whether it be true or not. The opinions pronounced in your Lordships' House in that case shew that both in substance and in form the decision was, and was intended to be, a reaffirmation of the old common law doctrine that actual fraud was essential to an action for deceit, and it finally settled the law that an innocent misrepresentation gives no right of action sounding in damages.

On the Common Law side of the Court the attempts to make a person liable for an innocent misrepresentation have usually taken the form of attempts to extend the doctrine of warranty beyond its just limits and to find that a warranty existed in cases where there was nothing more than an innocent misrepresentation. The present case is, in my opinion, an instance of this. But in respect of the question of the existence of a warranty the Courts have had the advantage of an admirable enunciation of the true principle of law which was made in very early days by Holt C.J. with respect to the contract of sale. He says: 'An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended.' So far as decisions are concerned, this has, on the whole, been consistently followed in the Courts of Common Law. But from time to time there have been dicta inconsistent with it which have, unfortunately, found their way into text-books and have given rise to confusion and uncertainty in this branch of the law. For example, one often sees quoted the dictum of Bayley J. in *Cave* v. *Coleman* (3 Man. & Ry. 2), where, in respect of a representation made verbally during the sale of a horse, he says that 'being made in the course of dealing, and before the bargain was complete, it amounted to a warranty'—a proposition that is far too sweeping and cannot be supported. A still more serious deviation from the correct principle is to be found in a passage in the judgment of the Court of Appeal in *De Lassalle* v. *Guildford* ([1901] 2 K. B. 215, at p. 221) which was cited to us in the argument in the present case. In discussing the question whether a representation amounts to a warranty or not the judgment says: 'In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment.'

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With all deference to the authority of the Court that decided that case, the proposition which it thus formulates cannot be supported. It is clear that the Court did not intend to depart from the law laid down by Holt C.J. and cited above, for in the same judgment that dictum is referred to and accepted as a correct statement of the law. It is, therefore, evident that the use of the phrase 'decisive test' cannot be defended. Otherwise it would be the duty of a judge to direct a jury that if a vendor states a fact of which the buyer is ignorant, they must, as a matter of law, find the existence of a warranty, whether or not the totality of the evidence shews that the parties intended the affirmation to form part of the contract; and this would be inconsistent with the law as laid down by Holt C.J. It may well be that the features thus referred to in the judgment of the Court of Appeal in that case may be criteria of value in guiding a jury in coming to a decision whether or not a warranty was intended; but they cannot be said to furnish decisive tests, because it cannot be said as a matter of law that the presence or absence of those features is conclusive of the intention of the parties. The intention of the parties can only be deduced from the totality of the evidence, and no secondary principles of such a kind can be universally true.

It is, my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made. In the present case the statement was made in answer to an inquiry for information. There is nothing which can by any possibility be taken as evidence of an intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement. It is a representation as to a specific thing and nothing more. The judge, therefore, ought not to have left the question of warranty to the jury, and if, as a matter of prudence, he did so in order to obtain their opinion in case of appeal, he ought then to have entered judgment for the defendants notwithstanding the verdict.

It will, of course, be evident that I have been dealing only with warranty or representation relating to a specific thing. This is wholly distinct from the question which arises when

goods are sold by description and their answering to that description becomes a condition of the contract. It is, in my opinion, a failure to recognize that in the present case the parties were referring (as is evident by the written contracts) to one specific thing only that led Farwell L.J. to come to a different conclusion from that to which your Lordships ought, in my opinion, to come in this appeal.

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VISCOUNT HALDANE, L.C., and LORD ATKINSON agreed.

Order of the Court of Appeal reversed and judgment entered for the appellants.

'I take it to be quite clear, that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances; and that this Court will not hold the party to whom the representation has been made bound, unless such a communication has been made.'—Per Turner, L.J., in *Traill* v. *Baring* (1864) 4 De G. J. & S. at p. 329.

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On the 30th of June, 1874, one *J. T. Evans*, who had previously been manager at *Liverpool* of a branch office of the *London and Provincial Marine Insurance Company*, and had had power to issue policies, became their agent at a salary; he was thereafter to to submit all proposals for insurances to the office of the company in *London*, where the proposals were to be approved of or refused, and whence the policies were to be issued. In April, 1876, the company discovered that *Evans* had issued a policy in the name of the company without their authority and without accounting to the company for the premiums. Major *Daniell*, the secretary of the company, thereupon went to *Liverpool*, and finding that there were other similar cases, after consulting with Mr. *Burn* the solicitor of the company, gave orders to detectives to arrest

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Evans if he was found. On the 14th of April Mr. *Gee* and Mr. *Humphreys*, friends of *Evans's*, called upon Major *Daniell* and pressed for an arrangement, which he refused to entertain, stating that he could not release the orders for the arrest, and referring them to Mr. *Burn*. On the 15th of April Mr. *Gee* and Mr. *Humphreys* called on Mr. *Burn*, who, amongst other things, said that he would not be a party to compounding a felony, but that there were two ways of looking at things, the civil and the criminal. Later in that day Mr. *Burn* had a conference with counsel in *London*, who gave his opinion that *Evans* could not be charged either with embezzlement or as a fraudulent bailee. Upon this the instructions for the arrest of *Evans* were withdrawn. Still later on that day Mr. *Gee* had a second interview with Mr. *Burn*, who said that if *Evans* was prepared to deposit a sum of money, Mr. *Burn* would advise the company to take it as a security and to go into accounts with *Evans*, but nothing was said as to any agreement not to prosecute *Evans*, nor did Mr. *Burn* say that in his opinion any criminal offence had been committed, though he spoke of embezzlement; and on Mr. *Gee* saying, 'You will take care not to arrest *Evans* before Tuesday,' Mr. *Burn* said, 'Certainly not.' On the 18th of April, 1877, Mr. *Gee*, Mr. *Humphreys*, and the Plaintiff, *J. E. Davies*, another friend of *Evans's*, came to Mr. *Burn's* office, and arranged that £2000 should be deposited in a bank in the names of Major *Daniell*, Mr. *Borrodaile*, and Mr. *Davies*. The money was accordingly deposited, and an agreement expressed to be made between the company and *Evans* was drawn up and signed by *Davies*. The terms were that *Evans* should forthwith account to the company for all moneys due by him to the company, and indemnify the company in respect of certain policies of insurance and premiums received by him without having submitted the proposals to the company; that the sum of £2000 should be deposited in the names of *J. Borrodaile*, *J. L. Daniell*, and *J. E. Davies*, who should hold it as collateral security, in trust (*a*) to pay certain expences, (*b*) to pay certain re-insurances, (*c*) to indemnify the company, (*d*) to secure to the company the payment of all premiums received by *Evans* and not hitherto paid as therein mentioned, (*e*) subject to compliance with the above terms and to all the aforesaid payments being made, the £2000, or the balance thereof, to be paid to Mr. *Davies*; this

arrangement not to prejudice or delay the company in any proceedings they might think proper to take for an account and recovery of moneys due or to become due from *Evans* to the company as agent for the company.

A large sum of money remained due from *Evans* to the company, and the company brought an action in this Court against *Davies* and *Borrodaile* claiming to have the £2000 paid to them. The action came on for trial before Mr. Justice *Fry* in July, 1877, the principal defence set up by *Davies* being that the agreement of the 18th of April was illegal, as intended to compound a felony, and could not be enforced. In the course of the examination of the witnesses it came for the first time to the knowledge of *Davies* and his friends that before the agreement was made and the money deposited, the company had been advised that *Evans* could not be prosecuted for felony, and had withdrawn the instructions for his arrest. It further appeared that part of the £2000 was obtained by or through other friends, and that part was obtained or met by *Evans* himself. At the end of that trial Mr. Justice *Fry* expressed an opinion in favour of the company; but his Lordship directed the action to stand over, giving *Davies* leave to bring an action to have the agreement of the 18th of April cancelled.

Davies accordingly brought an action against the company, *Borrodaile*, and *Daniell*, alleging that Mr. *Burn*, on behalf of the company, had concealed the facts, and had deliberately allowed *Evans's* friends to continue in the belief that if the £2000 was not deposited the company were in a position to arrest and criminally prosecute him; and that *Davies* was induced to act as he did by such pressure and for such consideration alone. And the Plaintiff claimed to have the agreement cancelled and the £2000 paid to him.

The two actions now came on together. Witnesses were examined on both sides, and the effect of the evidence is stated above, and in the judgment below.

FRY, J.—I have now before me two actions, one by the *London and Provincial Marine Insurance Company* against *Davies*, and another by *Davies* against the *London and Provincial Marine Insurance Company* and other Defendants. The question which I have to determine is with regard to a sum of £2000 paid into

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a joint account under the circumstances which I am about to mention. [His Lordship then stated the facts of the case, and that he found as a fact that during the interview in the morning of Saturday the 15th of April there had been a belief common to both contracting parties that there was at least a probable cause for the prosecution of *Evans*, and that it was the intention of the company to prosecute; that there had been a reliance upon a third fact, namely, the fact that the police had instructions to arrest *Evans* upon that charge; and that all those three things were known by Mr. *Burn* on behalf of the company to be operating upon the minds of the persons with whom he was negotiating. But in the time between the two interviews all those things had been changed, and the question was whether it was right to allow the pressure which had been exerted upon the minds of one of the negotiating parties to remain operative after the circumstances had entirely changed. Upon the whole evidence his Lordship had come to the conclusion that nothing was said or done at the second interview which could have induced or did induce Mr. *Gee* to believe that those circumstances were changed, and that Mr. *Burn* must have known at the close of that interview that that was the state of mind of Mr. *Gee*, and that therefore the pressure was still operative. His Lordship then continued :—]

The state of facts to which I have referred has given rise to an elaborate argument upon the duty of Mr. *Burn* to make disclosures under the circumstances which existed. The law upon that point seems to me to stand very much in this position. Where parties are contracting with one another, each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say that there was a duty to disclose, to shew that the duty existed. Now undoubtedly that duty does in many cases exist. In the first place, if there be a pre-existing relationship between the parties, such as that of agent and principal, solicitor and client, guardian and ward, trustee and *cestui que trust*, then, if the parties can contract at all, they can only contract after the most ample disclosure of everything by the agent, by the solicitor, by the guardian, or by the trustee. The pre-existing relationship involves the duty of entire disclosure. In the next place, there are certain contracts which have been called contracts

uberrimæ fidei where, from their nature, the Court requires disclosure from one of the contracting parties. Of that description there are well-known instances to be found. One is a contract of partnership, which requires that one of the partners should disclose to the other all material facts. So in the case of marine insurance, the person who proposes to insure a ship or goods must make an entire disclosure of everything material to the contract. Again, in ordinary contracts the duty may arise from circumstances which occur during the negotiation. Thus, for instance, if one of the negotiating parties has made a statement which is false in fact, but which he believes to be true and which is material to the contract, and during the course of the negotiation he discovers the falsity of that statement, he is under an obligation to correct his erroneous statement ; although if he had said nothing he very likely might have been entitled to hold his tongue throughout. So, again, if a statement has been made which is true at the time, but which during the course of the negotiations becomes untrue, then the person who knows that it has become untrue is under an obligation to disclose to the other the change of circumstances.

It has been argued here that the contract between the surety (for in fact *Davies* was a surety for *Evans*) and the creditor, is one of those contracts which I have spoken of as being *uberrimæ fidei*, and it has been said that such a contract can only be upheld in the case of there being the fullest disclosure by the intending creditor. I do not think that that proposition is sound in law. I think that, on the contrary, that contract is one in which there is no universal obligation to make disclosure, and therefore I shall not determine this case on that view. But I do think that the contract of suretyship is, as expressed by Lord *Westbury* in *Williams* v. *Bayley* (Law Rep. 1 H. L. 200, 219), one which 'should be based upon the free and voluntary agency of the individual who enters into it.' I think that principle especially applicable here, because there is no consideration in this case, as in many cases of suretyship, for the contract so entered into ; and therefore I think, to use the language of Lord *Eldon* in *Turner* v. *Harvey* (Jac. 169, 178), it is a contract in respect of which a very little is sufficient. Very little said which ought not to have been said, and very little not said which ought to have been said,

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would be sufficient to prevent the contract being valid. It is one, furthermore, in which I think that everything like pressure used by the intending creditor will have a very serious effect on the validity of the contract; and the case is stronger where that pressure is the result of maintaining a false conclusion in the mind of the person pressed.

Now, to apply those observations to this case, it will have been seen, from what I have already said, that I think the payment of money into the bank on the 18th of April was produced by what had been said by Major *Daniell* and by Mr. *Burn* at the first interview on the 15th of April; that it was produced by the belief that the company had a probable cause for prosecution; by the belief that, as a matter of fact, they did intend to prosecute; by the belief that the police were instructed to arrest *Evans*; and those things having been stated at the earlier interview of the 15th, it was, in my opinion, the duty of Mr. *Burn* to state at the second interview that those facts no longer existed. I think that the language in which he assented to and upheld the erroneous impression of Mr. *Gee* by speaking of *Evans* as a person who had embezzled, and by saying that the police should not arrest *Evans* until Tuesday, were sufficient circumstances in themselves to render it impossible that the payment of money produced by that pressure and by those representations should be valid. I think there was that little which is quite enough to prevent the contract from being upheld.

It is said, in answer to this line of argument, that the representations in this case did not induce the contract, and that if there was *dolus malus*, it was not *dolus malus* of which you could predicate that it was *dans locum contractui*. Now, I do not think that that view is tenable. It is said, no doubt, that *Evans* was supposed to be a rich man, and that *Evans* was not believed by his friends to have committed this offence. That may have been their state of mind when they began the negotiations. It certainly was not their state of mind on the 14th, still less was it their state of mind at their first interview on the 15th, and I think their state of mind was well known and appreciated by Mr. *Burn*.

It is further to be considered whether this agreement is not void upon another ground, namely, that these proceedings were an attempt to stifle a prosecution. Now, I think that it was so

understood by Mr. *Gee* and Mr. *Humphreys*, and that Mr. *Burn* understood that they so understood it, and that he believed that they considered themselves to be contracting for that purpose. I am very much inclined to think that would be enough to render the contract obnoxious to the well-known rule of law which makes a contract for the stifling of a prosecution void on grounds of public policy. But whether that be so or not, I think the contract is in this dilemma—either it was a contract to stifle a prosecution and is bad on that ground, or it was a contract produced by the belief that a prosecution was to be stifled when no prosecution was contemplated, and therefore the contract was produced by a misrepresentation, and on that ground also cannot stand.

A further argument adduced on behalf of the company is this. It is said that, assuming the contract to be illegal, *Davies* was equally a party to that illegal contract, and that therefore the Court will stay its hand, and then the maxim *melior est positio defendentis* will prevail. But, in the first place, there is great difficulty in applying that principle to a case where money has been placed *in medio*, and where the Court must do something with it, or else leave it to be locked up for ever.

In the next place, it appears to me to be clear that illegality resulting from pressure and illegality resulting from an attempt to stifle a prosecution do not fall within that class of illegalities which induces the Court to stay its hand, but are of a class in which the Court has actively given its assistance in favour of the oppressed party, by directing the money to be repaid. The case of *Williams* v. *Bayley* (Law Rep. 1 H. L. 200) appears to me a sufficient authority for that proposition, and therefore I do not think that that objection can prevail.

It appears, however, that a portion of the £2000 found by *Davies* was ultimately met by certain bills of *Evans*, or was found by *Evans*, and it has been suggested, perhaps as much by myself as by counsel for the company, that that created a difficulty in the way of the Plaintiff. I do not think that that objection can be maintained. I think that if the agreement was void on the grounds I have referred to, independently of any question with regard to contribution, the mere fact of there being a subsidiary arrangement under which *Evans* was to indemnify *Davies* to a certain extent, cannot make the transaction valid. If the company had

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dealt with *Evans* direct it might have been one thing, but as the company were pressing *Evans's* friends and coming to an agreement with them, which I hold to be illegal, the mere fact that *Evans's* friends had dealt with him will not, in my opinion, validate the agreement. Furthermore, the fact that *Davies* had, subsequently to signing the agreement and depositing the money, obtained security from *Evans* for a part of the amount, will not, I think, stand in his way, because it is evident from the facts before me that at the time when he did so he was not in full possession of the grounds upon which he has now come to seek relief—in fact, he never was fully informed of the grounds upon which he now maintains his case until the trial of the first action. It appears to me, for the reasons I have stated, that the contract cannot be upheld, and that it must be rescinded.

I have one other observation to make, which is, that, although I have been obliged to hold that this contract is affected with illegality and cannot be maintained, it does not appear to me a case in which there is any slur upon the personal conduct of any of the persons concerned. Major *Daniell* and Mr. *Burn* were acting under circumstances of great difficulty. They had to protect not merely the interests of the company with regard to the prosecution of their agent, but also the financial interests of the company ; and if they went wrong, as I think they did, they went wrong under circumstances which rendered their conduct very excusable.

Declare that the agreement of the 18th April, 1877, ought to be rescinded. Let the £2000, and any accumulations thereon, be paid to *Davies* and the friends of *Evans* who advanced the money, they being joined with *Davies* as Plaintiffs by amendment. Dismiss the first action with costs, except the costs of the hearing, which are to be paid by *Davies*: the Defendants in the second action to pay the costs of that action.

'As to *Derry* v. *Peek* (1889) 14 App. Cas. 337, I think, as we have already had reason more than once to explain, it decides two things, and two things only. First, the point of Common Law required no elaboration, namely, the point that an action for deceit or fraud, properly so-called, would only lie at law for a fraudulent misrepresentation—a fraudulent allegation that a fact existed which did not exist, in the truth of which representation the person making it had no genuine or honest belief. That was the rule at Common Law.

'But *Derry* v. *Peek* decides, secondly, that in cases such as those of which that case was an instance, there is no duty enforceable at law to be careful in the representation which is made. Negligent misrepresentation does not certainly amount to deceit, and negligent misrepresentation can only amount to a cause of action if there exist a duty to be careful—not to give information except after careful inquiry. In *Derry* v. *Peek*, the House of Lords considered that the circumstances raised no such duty.'—Per Bowen, L.J., in *Low* v. *Bouverie* [1891] 3 Ch. at p. 105.

NOCTON *v.* LORD ASHBURTON [1914] A. C. 932

APPEAL and cross-appeal from an order of the Court of Appeal reversing a judgment of Neville J. in an action brought in the Chancery Division by Lord Ashburton, the respondent in the original appeal, against Nocton, the appellant in the original appeal, and others.

VISCOUNT HALDANE, L.C.—My Lords, in the judgment I am about to read, my noble and learned friend Lord Atkinson desires me to say that he concurs.

My Lords, owing to the mode in which this case has been treated both by the learned judge who tried it and by the Court of Appeal, the question to be decided has been the subject of some uncertainty and much argument. But when the real character of the litigation has been made plain the difficulties which have attended the giving of relief appear to have been concerned with form and not with substance.

The action was brought by the respondent, Lord Ashburton, against the appellant, who had acted as his solicitor, for a declaration that the solicitor had improperly advised and induced him

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to advance 65,000*l.* upon a mortgage made in 1904 by other clients of the solicitor, a transaction out of which the solicitor was said to have got an advantage for himself, and for an order for indemnity against loss of interest and for replacement of the sum advanced. This was the prominent head of the relief sought. But by the statement of claim a further case was made which was really covered by the main relief asked for, and which only arose if, as happened, the claim for replacement of the amount of the mortgage was barred by acquiescence or by the Statute of Limitations.

It was alleged that subsequently, in December, 1905, a date within six years from the issue of the writ, the solicitor had improperly and in bad faith advised and induced Lord Ashburton to release from the latter's mortgage a valuable part of the security, knowing that the security would thereby be rendered insufficient, and that this was done by the solicitor in order that he might benefit in respect of a charge for 15,000*l.* in which he was interested, by rendering it a first charge. He was alleged to have represented untruly that the remaining security would be sufficient, and it was further alleged that it was insufficient, and that loss both of security for the principal sum of 65,000*l.* and of interest had occurred in consequence of the release. The defence was knowledge of the facts and of the position of the appellant on the part of Lord Ashburton, as well as a denial of the material allegations in the statement of claim, and a plea of the Statute of Limitations.

My Lords, I do not propose to enter into an examination of the evidence. The action was tried before Neville J., who had the appellant and the respondent before him in the witness-box. He treated the case as one of fraud simply, as, indeed, according to the statement of claim, in one sense it was. Fraud, he said, must be clearly and unmistakably proved, and it was not enough to prove the mere fact that a solicitor, in advising his client, was actuated by the belief that some advantage would accrue to himself. He found that, although the respondent 'fell far short of the duty which he was under as solicitor' to the appellant, he did not intend to defraud him, but that he would probably have given different advice had he not been personally interested in the result. The learned judge was no doubt influenced by the fact

that Lord Ashburton had previously embarked, to the knowledge and with the co-operation of the appellant, in other speculative transactions of large amounts, and that the release of the particular security in question might have enabled the mortgagors to raise more money and develop the value of Lord Ashburton's remaining security. At all events, he held that, while the appellant had failed in his duty and given bad advice, the case as launched was one in which charges of actual fraud had been made as its foundation, and that these charges having, as he thought, failed, the action ought to be dismissed.

The Court of Appeal took a different view. They held that the solicitor had, on the evidence, been guilty of actual fraud, so that an action of deceit would lie. If the action had been one of negligence they thought it would have been undefended, but the Master of the Rolls, in agreement with Neville J., said that 'it would be wrong to allow a case based solely on serious charges of fraud to be turned into a comparatively harmless case based on negligence.' As, however, they came to the conclusion that the solicitor had been guilty of actual deceit, this point was not important. The Court of Appeal therefore gave judgment for Lord Ashburton, and directed an inquiry as to damages to be held before the official referee.

My Lords, I think that to reverse the finding of the judge who tried the case and saw the appellant in the witness-box was, in the circumstances of this case, a rash proceeding on the part of the Court of Appeal. I have read the evidence of the appellant, and, although it is obviously unreliable evidence, it leaves on my mind the same impression that it left on that of the learned judge who heard it, that the solicitor did not consciously intend to defraud his client, but, largely owing to a confused state of mind, believed that he was properly joining with him and guiding him in a good speculation.

I cannot, therefore, treat the case, so far as based on intention to deceive, as made out. But where I differ from the learned judges in the Courts below is as to their view that, if they did not regard deceit as proved, the only alternative was to treat the action as one of mere negligence at law unconnected with misconduct. This alternative they thought was precluded by the way the case had been conducted. I am not sure that, on the

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pleadings and on the facts proved, they were right even in this. The question might well have been treated as in their discretion and as properly one of costs only, having regard to the unsatisfactory evidence of the appellant. But I do not take the view that they were shut up within the dilemma they supposed. There is a third form of procedure to which the statement of claim approximated very closely, and that is the old bill in Chancery to enforce compensation for breach of a fiduciary obligation. There appears to have been an impression that the necessity which recent authorities have established of proving moral fraud in order to succeed in an action of deceit has narrowed the scope of this remedy. For the reasons which I am about to offer to your Lordships, I do not think that this is so.

My Lords, much of the argument at the Bar turned on the interpretation of what was laid down by this House in *Derry* v. *Peek* (14 App. Cas. 337). It is of importance to be sure of what really was decided in that case. It has been the subject of much comment, both on what is expressly decided and on what has been considered to be implied in the judgments. The facts were these: A special Act incorporating a tramway company provided that the carriages might be moved by animal power and, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by the Act the company had the right to use steam power. The plaintiff took shares on the faith of this statement. The Board of Trade afterwards refused their consent to the use of steam power, and the company was wound up. The plaintiff then brought an action of deceit against the directors, based on the untrue statement. The case was tried in the Chancery Division, before Stirling J. He came to the conclusion that the defendants thought that what they had stated was true, inasmuch as they took the consent of the Board of Trade to be a matter of course, and he dismissed the action on the ground that there was no intention to deceive.

The Court of Appeal held that the directors ought to have taken care that they had reasonable grounds for their statement, and that as they had no reasonable grounds for making it, they were liable, notwithstanding that they had not intended to deceive. This House reversed that judgment and held that, the action being one of deceit, it was necessary to prove actual fraud.

Fraud must be proved by shewing that the false representation had been made knowingly or without belief in its truth, or recklessly without caring whether it was true or false. Mere carelessness or absence of reasonable ground for believing the statement to be true might be evidence of fraud, but the inference could be displaced by shewing that it was made under an honest impression that it was true.

My Lords, the discussion of the case by the noble and learned Lords who took part in the decision appears to me to exclude the hypothesis that they considered any other question to be before them than what was the necessary foundation of an ordinary action for deceit. They must indeed be taken to have thought that the facts proved as to the relationship of the parties in *Derry* v. *Peek* (14 App. Cas. 337) were not enough to establish any special duty arising out of that relationship other than the general duty of honesty. But they do not say that where a different sort of relationship ought to be inferred from the circumstances the case is to be concluded by asking whether an action for deceit will lie. I think that the authorities subsequent to the decision of the House of Lords shew a tendency to assume that it was intended to mean more than it did. In reality the judgment covered only a part of the field in which liabilities may arise. There are other obligations besides that of honesty the breach of which may give a right to damages. These obligations depend on principles which the judges have worked out in the fashion that is characteristic of a system where much of the law has always been judge-made and unwritten.

Even the action on the case for deceit was itself evolved by the judges, as is shewn by the dissenting judgment of Grose J. in *Pasley* v. *Freeman* ((1789) 3 T. R. 51) so comparatively recently as 1789. Up to that date it was at least doubtful whether the action lay in the absence of a special duty. The doctrines of obligation to exercise care by persons in particular situations, who are doing acts which may injure the property or persons of others ; of implied contract, as shewn in the evolution of the action of assumpsit and its development from case ; of the liability of the agent, who came at last to be treated as warranting the authority which he asserted ; of the right to an injunction and an account in equity in cases of passing off goods, as explained

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and contrasted with claims based on deceit in Lord Westbury's judgment in *Edelsten* v. *Edelsten* ((1863) 1 D. J. & S. 185), and in such later authorities as the judgment of Farwell J. in *Bourne* v. *Swan & Edgar* ([1903] 1 Ch. 211); these doctrines and the like illustrate the freedom which has been exercised by the judges in making new applications of recognized principles. Although liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act, it is none the less true that a man may come under a special duty to exercise care in giving information or advice. I should accordingly be sorry to be thought to lend countenance to the idea that recent decisions have been intended to stereotype the cases in which people can be held to have assumed such a special duty. Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement.

The decision of the House of Lords in *Derry* v. *Peek* (14 App. Cas. 337) was applied by the Court of Appeal in another case relating to a prospectus, a case which, like *Derry* v. *Peek* (14 App. Cas. 337), has given rise to comment. In *Angus* v. *Clifford* ([1891] 2 Ch. 449) the directors had affirmed in their prospectus that the reports of certain mining engineers 'were prepared for the directors' when they were really prepared for the promoters. The judge who tried the case thought that the directors had not taken proper care as to what they stated, and held them liable. But he did not find that they had made the untrue statements fraudulently as distinguished from carelessly. The Court of Appeal applied the law as laid down in *Derry* v. *Peek* (14 App. Cas. 337). As the judge who tried the case had not found fraud they considered that they could not properly do so, and treated the words used as having been simply passed over by the directors without seeing their importance. This they thought amounted to gross and culpable carelessness in the use of language, but not to dishonesty, and they took the view that *Derry* v. *Peek* (14 App. Cas. 337) had decided that there was no legal duty cast upon persons in such a position to take reasonable care in forming their belief. Bowen L.J. observed that while there was nothing

new in deciding, as had been done by the House of Lords, that proof of an actually fraudulent mind was necessary to found an action for deceit at common law, the really important step taken was the decision, which he seems to have taken to be of very general application, that there was no duty to be careful in such cases. An honest blunder in the use of language is not dishonest, and unless there is such a duty is not actionable.

My Lords, it is plain that between the grossly careless use of language and the reckless use which will still give a right to succeed in an action for deceit the line of demarcation may seem to plain persons to be very fine. I do not wonder that the decisions in *Derry* v. *Peek* (14 App. Cas. 337) and *Angus* v. *Clifford* ([1891] 2 Ch. 449) have on this point given rise to some heartburning. But the principle laid down that a mens rea is essential, in the absence of a duty to be careful, was no new one, nor is it now open to question. The difficulty as regards the principle lies in its application to individual cases. It is to the view taken of the facts by the judge of first instance, who has tried the question of fact and decided on which side of the line of demarcation the case lies, that comment should be generally directed. For, though not impossible, it is difficult for a Court of Appeal to review his finding after seeing the witnesses, especially in cases of this class. What requires closer consideration is the generality of the language used in some of the judgments of this House in *Derry* v. *Peek* (14 App. Cas. 337), to the effect that in such cases there is no legal as distinguished from moral duty to be careful. Soon after the decision the Legislature, in the Directors' Liability Act of 1890, imposed a statutory obligation on those who issue prospectuses. But in other cases the decision remains binding as to what is really established, and its principle stands.

To what cases, then, does that principle extend? In his judgment Lord Herschell (at p. 360) carefully excluded from it 'those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course.' In such cases he thought, following what Lord Selborne had said in *Brownlie* v. *Campbell* (5 App. Cas. 925, at p. 935), that honest belief in the truth of the answer was no defence.

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This exception was considered by the Court of Appeal, consisting of Lindley, Bowen, and Kay L.JJ., the Court that had decided *Angus* v. *Clifford* ([1891] 2 Ch. 449), in *Low* v. *Bouverie* ([1891] 3 Ch. 82). There the defendant, who was trustee of a fund, had replied to the inquiry of a person who contemplated making a loan to a beneficiary on the security of the fund, that the interest of the latter was subject to certain incumbrances which he mentioned, but he did not say there were no others. In fact there were others which he had forgotten. That the defendant was not liable for deceit was clear, but it was contended that as a trustee he was liable for breach of duty to give correct information. But the Court of Appeal held, as I think rightly, that the duty of a trustee did not extend to furnishing answers to inquiries such as were made in the case.

Lindley L.J. said that in the absence of such a duty the trustee could not be made liable. Before *Derry* v. *Peek* (14 App. Cas. 337) he observed that it had been generally supposed to have been settled in equity that a person who carelessly, although honestly, made a false representation as to matters within his special knowledge to another about to deal in a matter of business on the faith of the representation was liable. *Burrowes* v. *Lock* (10 Ves. 470) and *Slim* v. *Croucher* (1 D. F. & J. 518) were regarded as having laid this down. But *Burrowes* v. *Lock* (10 Ves. 470) could be supported on the quite different ground of estoppel, that is to say, on the ground that the trustee in that case was precluded from denying that the share in question was unencumbered, as he had asserted this in unambiguous words on the faith of which the plaintiff in the suit had changed his position. It could not be supported on the wider ground. *Slim* v. *Croucher* (1 D. F. & J. 518), in which the assertion was that a valid lease would be granted in the future, could not be supported on the ground of estoppel, and, as he thought, probably could not be on that of warranty. It must therefore, in his opinion, be taken to be no longer law. In the case before him, *Low* v. *Bouverie* ([1891] 3 Ch. 82), there was no such precision of statement about the absence of incumbrances as could give rise to estoppel. Lindley and Bowen L.JJ. concurred in holding that if there had been a duty to be careful the case would have been untouched by *Derry* v. *Peek* (14 App. Cas. 337). But they held that as

such a breach of duty did not exist, and as fraud, warranty, and estoppel were all negatived, there was no liability.

My Lords, in *Slim* v. *Croucher* (1 D. F. & J. 518) the circumstances were unusual, and it may be that the decision can be supported on the ground that the defendant warranted by implication that he had power to grant a valid lease. It is not, however, necessary to express an opinion on the point. But in the appeal before us I do not think that any question of warranty or estoppel arises, and if moral fraud has not been established the only question which remains is whether there has been such a breach of duty as gives rise to liability. Now such a duty might arise either at law or in equity. And I do not understand Lord Herschell, who mentioned the case of a legal as distinguished from merely a moral duty, to have intended in any way to exclude duty of which only a Court of Equity took cognizance. If among the great common lawyers who decided *Derry* v. *Peek* (14 App. Cas. 337) there had been present some versed in the practice of the Court of Chancery, it may well be that the decision would not have been different, but that more and explicit attention would have been directed to the wide range of the class of cases in which, on the ground of a fiduciary duty, Courts of Equity gave a remedy.

My Lords, it is known that in cases of actual fraud the Courts of Chancery and of Common Law exercised a concurrent jurisdiction from the earliest times. For some of these cases the greater freedom which, in early days, the Court of Chancery exercised in admitting the testimony of parties to the proceedings made it a more suitable tribunal. Moreover, its remedies were more elastic. Operating in personam as a Court of conscience it could order the defendant, not, indeed, in those days, to pay damages as such, but to make restitution, or to compensate the plaintiff by putting him in as good a position pecuniarily as that in which he was before the injury.

But in addition to this concurrent jurisdiction, the Court of Chancery exercised an exclusive jurisdiction in cases which, although classified in that Court as cases of fraud, yet did not necessarily import the element of dolus malus. The Court took upon itself to prevent a man from acting against the dictates of conscience as defined by the Court, and to grant injunctions in anticipation of injury, as well as relief where injury had been

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done. Common instances of this exclusive jurisdiction are cases arising out of breach of duty by persons standing in a fiduciary relation, such as the solicitor to the client, illustrated by Lord Hardwicke's judgment in *Chesterfield* v. *Janssen* ((1750) 2 Ves. Sen. 125.) I can hardly imagine that those who took part in the decision of *Derry* v. *Peek* (14 App. Cas. 337) imagined that they could be supposed to have cast doubt on the principle of any cases arising under the exclusive jurisdiction of the Court of Chancery. No such case was before the House, which was dealing only with a case of actual fraud as to which the jurisdiction in equity was concurrent.

The judgment in *Evans* v. *Bicknell* (6 Ves. 174) of Lord Eldon, who not only possessed wide experience of Chancery procedure but had been Chief Justice of the Common Pleas, is instructive as to the character of the equity jurisdiction, especially so far as it is concurrent, and another great judge, Sir William Grant, confirmed his view in *Burrowes* v. *Lock* (10 Ves. 470). The latter case can probably be now supported only on the ground of estoppel, but the exposition of the principle of the concurrent jurisdiction remains intact.

A similar observation applies to *Slim* v. *Croucher* (1 D. F. & J. 518), to which I have already referred. It was not expressly found that there was a duty in breach of which the misrepresentation alleged was made, and there was neither fraud nor estoppel. But the case remains valuable, whatever view may be taken of its result, on account of the exposition of the equity jurisdiction given by Lord Campbell L.C. and Knight Bruce and Turner L.JJ., judges of great experience. So far as the equity jurisdiction in cases of what is called fraud is concurrent only and exercised in actions for mere deceit apart from breach of special duty, an actual intention to cheat has now to be proved. But there are cases of other classes to which, as I have already said, the Court of Chancery undoubtedly did apply the term fraud, although I think unfortunately.

Fraud in such cases is, as James L.J. said in *Torrance* v. *Bolton* ((1872) L. R. 8 Ch. 118, at p. 124), 'nomen generalissimum, and it must not be construed so as to mislead persons into the notion that contracts for the sale and purchase of lands are in any respect privileged, so as to be free from the ordinary jurisdiction of the

Court to deal with them as it deals with any instrument, or any other transactions, in which the Court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained. Indeed, the books are full of cases in which the Court has dealt with contracts of that kind—contracts obtained by persons from others over whom they have dominion, contracts obtained by persons in a fiduciary position, contracts for the sale of shares obtained by directors through misrepresentation contained in the prospectus, in respect of which it was never necessary to allege or prove that the directors were wilfully guilty of moral fraud in what they had done.' In Chancery the term 'fraud' thus came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction. What was laid down by Lord Eldon in this House in *Bulkley* v. *Wilford* ((1834) 2 Cl. & F. 102, at p. 177) explains the nature of the duty.

My Lords, I have dealt thus fully with this distinction because I think that confusion has arisen from overlooking it. It must now be taken to be settled that nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit. This is so whether a Court of Law or a Court of Equity, in the exercise of concurrent jurisdiction, is dealing with the claim, and in this strict sense it was quite natural that Lord Bramwell and Lord Herschell should say that there was no such thing as legal as distinguished from moral fraud. But when fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression 'constructive fraud' came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What

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it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience.

Derry v. *Peek* (14 App. Cas. 337) simply illustrates the principle that honesty in the stricter sense is by our law a duty of universal obligation. This obligation exists independently of contract or of special obligation. If a man intervenes in the affairs of another he must do so honestly, whatever be the character of that intervention. If he does so fraudulently, and through that fraud damage arises, he is liable to make good the damage. A common form of dishonesty is a false representation fraudulently made, and it was laid down that it was fraudulently made if the defendant made it knowing it to be false, or recklessly, neither knowing nor caring whether it was false or true. That is fraud in the strict sense.

The Courts had also power to rescind contracts of many kinds obtained by an innocent misrepresentation, so long at least as the contract had not been superseded by being carried into effect. The condition attached to the plaintiff's right was that he should be able and willing to make restitution in integrum. If so, however free the defendant might have been from any intention to deceive, he was not allowed to retain what he had obtained from the plaintiff by a material misstatement on which the latter was entitled to rely as being true. This, like the obligation to be honest, was a principle of general application, which did not depend on any special relationship of the parties or duty arising from it.

But side by side with the enforcement of the duty of universal obligation to be honest and the principle which gave the right to rescission, the Courts, and especially the Court of Chancery, had to deal with the other cases to which I have referred, cases raising claims of an essentially different character, which have often been mistaken for actions of deceit. Such claims raise the question whether the circumstances and relations of the parties are such as to give rise to duties of particular obligation which have not been fulfilled. Prior to *Derry* v. *Peek* (14 App. Cas. 337) the distinction between the different classes of case had not been sharply drawn, and there was some confusion between fraud as descriptive of the dishonest mind of a person who knowingly

deceives, and fraud as the term was employed by the Court of Chancery and applied to breach of special duty by a person who erred, not necessarily morally but at all events intellectually, from ignorance of a special duty of which the Courts would not allow him to say that he was ignorant.

Such a special duty may arise from the circumstances and relations of the parties. These may give rise to an implied contract at law or to a fiduciary obligation in equity. If such a duty can be inferred in a particular case of a person issuing a prospectus, as, for instance, in the case of directors issuing to the shareholders of the company which they direct a prospectus inviting the subscription by them of further capital, I do not find in *Derry* v. *Peek* (14 App. Cas. 337) an authority for the suggestion that an action for damages for misrepresentation without an actual intention to deceive may not lie. What was decided there was that from the facts proved in that case no such special duty to be careful in statement could be inferred, and that mere want of care therefore gave rise to no cause of action. In other words, it was decided that the directors stood in no fiduciary relation and therefore were under no fiduciary duty to the public to whom they had addressed the invitation to subscribe. I have only to add that the special relationship must, whenever it is alleged, be clearly shewn to exist.

My Lords, the solicitor contracts with his client to be skilful and careful. For failure to perform his obligation he may be made liable at law in contract or even in tort, for negligence in breach of a duty imposed on him. In the early history of the action of assumpsit this liability was indeed treated as one for tort. There was a time when in cases of liability for breach of a legal duty of this kind the Court of Chancery appears to have exercised a concurrent jurisdiction. That was not remarkable, having regard to the defective character of legal remedies in those days. But later on, after the action of assumpsit had become fully developed, I think it probable that a demurrer for want of equity would always have lain to a bill which did no more than seek to enforce a claim for damages for negligence against a solicitor. The judgment of Hall V.-C. in *British Mutual Investment Co.* v. *Cobbold* ((1875) L. R. 19 Eq. 627) is in accordance with this view.

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This, however, does not end the matter. When, as in the case before us, a solicitor has had financial transactions with his client, and has handled his money to the extent of using it to pay off a mortgage made to himself, or of getting the client to release from his mortgage a property over which the solicitor by such release has obtained further security for a mortgage of his own, a Court of Equity has always assumed jurisdiction to scrutinize his action. It did not matter that the client would have had a remedy in damages for breach of contract. Courts of Equity had jurisdiction to direct accounts to be taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him. This jurisdiction, which really belonged to the exclusive jurisdiction of the Court of Chancery, had for the client the additional advantage that, as is illustrated by the judgment of Lord Hatherley L.C. in *Burdick* v. *Garrick* ((1870) L. R. 5 Ch. 233), the Statute of Limitations would not apply when the person in a confidential relationship had got the property into his hands.

My Lords, since the Judicature Act any branch of the Court may give both kinds of relief, and can treat what is alleged either as a case of negligence at common law or as one of breach of fiduciary duty. The judgment of Jessel M.R. in *Cockburn* v. *Edwards* ((1881) 18 Ch. D. 449) may, I think, really be regarded as an illustration of the latter jurisdiction. In the case with which we are dealing the statement of claim was framed mainly on the lines of breach of fiduciary duty. This was probably deliberately done in order to endeavour to get over the difficulty occasioned by the Statute of Limitations as regards any mere case of negligence in the original mortgage transaction of 1904. As a consequence fraud has been charged in the peculiar sense in which it was the practice to charge it in Chancery procedure in cases of this kind. But the facts alleged would none the less, if proved, have afforded ground for an action for mere negligence.

I think that Neville J. was wrong in treating this case as if it were based in substance only on deceit and intention to cheat. No doubt a good deal was said both in argument and in cross-

examination which, if established, would have afforded proof of actual fraud. But that was no reason for treating the action as launched wholly on this foundation. It was really an action based on the exclusive jurisdiction of a Court of Equity over a defendant in a fiduciary position in respect of matters which at law would also have given a right to damages for negligence.

The judges of the Court of Appeal appear to have taken some such view, with this difference, that they found actual fraud. I think, as I have already said, that it is only in exceptional circumstances that judges of appeal, who have not seen the witness in the box, ought to differ from the finding of fact of the judge who tried the case as to the state of mind of the witness. A study of the evidence of the appellant has brought me to the conclusion that Neville J. was probably right in the conclusion he reached. I think the appellant was negligent and rash and regardless of the obligations of his position. I think his evidence utterly untrustworthy. But I cannot agree in holding that Neville J. has been shewn to be wrong in refusing to draw the inference that he intended to cheat.

My Lords, the conclusion at which I have arrived is that this action ought properly to have been treated as one in which the plaintiff had made out a claim for compensation either for loss arising from misrepresentation made in breach of fiduciary duty or for breach of contract to exercise due care and skill. The main head of claim, that relating to the mortgage of 1904, is barred in equity by the acquiescence of the plaintiff, and at law by the Statute of Limitations.

The second head of claim, which is quite sufficiently stated in the pleadings, is not so barred. I am of opinion that Lord Ashburton was entitled to succeed on this second claim. The proper mode of giving relief might have been to order Mr. Nocton to restore to the mortgage security what he had procured to be taken out of it, in addition to making good the amount of interest lost by what he did. The measure of damages may not always be the same as in an action of deceit or for negligence. But in this case the question is of form only, and is not one which it is necessary to decide. I am not sure that such an order would have been more merciful to Mr. Nocton than the order for an inquiry as to damages which was actually made. At all events,

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Mr. Nocton's advisers did not at any time object and ask for the other alternative, and it is too late to ask for it now.

There was before us a cross-appeal by the respondent from the decision against him that he could not now complain of the transaction in 1904 relative to his mortgage for 65,000*l*. I think that, on the ground assigned by the Court of Appeal, that claim fails. For the reasons I have given, and, having regard to the unsatisfactory way in which Mr. Nocton gave his evidence, I think that no injustice has been done by any part of the order under review, and I move that this appeal and the cross-appeal be each dismissed with costs.

LORDS DUNEDIN, SHAW, and PARMOOR agreed.

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'The fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. . . .

'And we further agree that the contract continues valid till the party defrauded has determined his election by avoiding it. . . .

'We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind.'—*Per curiam* in *Clough* v. *London & North-Western Railway Co.* (1871) L. R. 7 Ex. at pp. 34–5.

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Action for money had and received.

Plea: Never indebted. Issue thereon.

On the trial, before Lord Campbell C.J., at the London Sittings after last Michaelmas Term, the statements made by the plaintiff's counsel, in opening his case, were: that, in 1853, the plaintiff was induced, by representations made by the three defendants, to take shares in a Company called The Welsh Potosi Lead and Copper Mining Company, which was then formed for working a mine on the cost book principle, and of which the defendants were directors; and to pay deposits for those shares. The mine was worked by the Company during the years 1854, 1855 and

1856; and dividends were declared in each of those years. The plaintiff was induced to accept fresh allotments of shares in lieu of the dividends declared. In 1857 the Company was in bad circumstances: it was, with the plaintiff's assent, registered as a Company with limited liability, and was afterwards wound up under the Winding-up Act. During the process of winding up, the plaintiff for the first time discovered that the representations by which he was induced to make the purchase were false and fraudulent on the part of the defendants, and that the dividends declared were fraudulent dividends. He therefore brought this action to recover back the deposits which he had paid for the shares.

The Lord Chief Justice declared it to be his opinion that, assuming the contract to take shares to have been induced by fraud, it was not void but only voidable, and that it could not be avoided by the plaintiff after he had taken benefit under the contract. He was therefore of opinion that, assuming the statement to be proved, the plaintiff's remedy was by an action for deceit, and that he could not maintain the present action for money had and received. On this ground he nonsuited the plaintiff on the opening of his counsel.

Kinglake Serjt., in last Hilary Term, obtained a rule Nisi for a new trial, on the ground: 'that the Lord Chief Justice, on the opening statement of counsel for the plaintiff, "That the plaintiff was induced by fraud and fraudulent misrepresentation to become a shareholder in a Company of which the defendants were at the time directors and privy to the fraud, and had subsequently, but before discovering the fraud, received credit for a dividend fraudulently paid out of capital," was wrong in holding that the plaintiff was not entitled to recover the moneys paid by him on such shares.'

Knowles, Edwin James, Dowdeswell and Aspland now shewed cause. The general doctrine, that fraud does not render a contract void, but only voidable at the election of the party defrauded, is now well settled; *Load* v. *Green* (15 M. & W. 216), *Murray* v. *Mann* (2 Exch. 538). It is too late for him to avoid the contract after a third party has acquired an interest; *Kingsford* v. *Merry* (11 Exch. 577). Neither can be avoid the contract if he has dealt with the article as his own; *Campbell* v. *Fleming* (1 A. & E. 40).

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In that case the dealing was after the party had notice of the fraud; but the principle applies if he has received any benefit before the discovery. 'There can be no rescission of the contract, unless the parties can be placed in statu quo;' per Parke B. in *Blackburn* v. *Smith* (2 Exch. 783, 790). There is no rescission unless it be total; *Ferguson* v. *Carrington* (9 B. & C. 59), *Strutt* v. *Smith* (1 C. M. & R. 312). So in *Sully* v. *Frean* (10 Exch. 535 a plea to a bill of exchange, that the bill was for the price of a ship which the defendant was induced to buy by means of false and fraudulent representations as to its state, it being in fact rotten, was held not issuable; Parke B. observing: 'The plea merely sets up at best a partial failure of consideration. The defendant still has the ship.' In *Deposit Life Assurance* v. *Ayscouch* (6 E. & B. 761, 762) the same principle was stated by Crompton J. He says: 'When the record shews that the contract has been executed so far that the defendant has received a benefit, I have doubted whether, in an action on the contract, the plea of fraud must not shew that he has restored what he has received.' And it is understood that subsequently, in a case of *Cole* v. *Bishop*, nowhere reported, this Court acted upon that principle that this doubt was well founded. The principle laid down by Lord Ellenborough in *Hunt* v. *Silk* (5 East, 449), that, 'Where a contract is to be rescinded at all, it must be rescinded in toto, and the parties put in statu quo,' is as applicable to a rescission on the ground of fraud as to any other rescission. Now how, on the plaintiff's own statement, can he here put the parties in statu quo? He has had shares; and for three years he has had the chance of their proving profitable. He has received dividends; he might have received them in money, but elected to receive them in shares; and on them also he has had his chance of profit. An offer to return these shares now, if it were practicable, would be like an offer to return a lottery ticket after it has turned up a blank. But it is not possible to return the shares: the other partners in the mine and the creditors of the Company have vested rights which prevent that. And, besides, the nature of the shares has been changed; they have, by the act of the plaintiff, been converted from shares in a common partnership into shares in a Company with limited liability.

Kinglake Serjt., Phinn and Horace Lloyd, in support of the rule.

The question is, whether the opening statement disclosed a case to go to the jury: if it did, the nonsuit was wrong. An allottee of shares in a mine, to be conducted on the cost book principle, may recover his deposits; *Johnson* v. *Goslett*. [CROMPTON, J.—In that case the projected Company was wholly abortive.] The case is as strong when the company is fraudulent. It is not to be disputed that fraud does not render a contract void except at the option of the party defrauded. [CROMPTON, J.—When you enunciate the proposition that a party has a right to rescind, you involve in it the qualification, if the state of things is such that he can rescind. If you are fraudulently induced to buy a cake you may return it and get back the price; but you cannot both eat your cake and return your cake.] The decision in *Campbell* v. *Fleming* (1 A. & E. 40) turned entirely on the dealing with the property after the discovery of the fraud. The statement here was that the defendants were themselves fraudulent; it cannot be said that this fresh fraud put the dividends in a better situation. [LORD CAMPBELL, C.J.—For three years the plaintiff has had the chance of profit. Do you say that in the case put, of the lottery ticket, you could return it after it had turned up a blank? CROMPTON, J.—And, besides, the plaintiff has changed the nature of the shares. Do you say that a butcher who has bought live cattle could insist on the vendor restoring the price and taking back the slaughtered carcases?] It is hard if all remedy for the fraud is lost where the deceit can be prolonged till the deceived party has acted on it. [CROMPTON, J.—All remedy is not lost. He can no longer rescind the contract, which would work injustice; but he may bring an action on the deceit, and recover his real damage. ERLE, J.—That was the case of *Cole* v. *Bishop* (not reported). The purchaser was unable to treat the contract as void ab initio: but in a cross action tried before me, of *Bishop* v. *Cole*, he recovered a full indemnity.]

ERLE, J.—I am of opinion that the nonsuit was right. The plaintiff claims to repudiate the contract under which shares were allotted to him; to give up the shares, and recover back the price. There are several grounds of objection, all falling under the same principle: the plaintiff cannot avoid the contract under which he took the shares, because he cannot restore them in the same state

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as when he took them. In 1853 the plaintiff accepted the shares; and from that time he was, in point of law, in possession of the mine, and worked it by his agent the purser. After three years working of the mine, and trying to make a profit, he cannot restore the shares as they were before this was done. But, further, he not only had the chance of profit, but dividends were declared, and received by him. They were not received in money, it is true; but the receipt of money's worth has the same effect in law. Then he has also changed the nature of the article: the shares he received were shares in a company on the cost book principle; the plaintiff offers to restore them after he has converted them into shares in a joint stock corporation. Lastly, the offer to restore these shares is not made till after the Company is in the course of being wound up, when all chance of profit is over, and the shares can only be a source of loss. I have looked at this as if no others were concerned but the plaintiff and defendants; but no doubt there may have been liabilities incurred by the plaintiff to third persons, rendering it impossible for him to rescind.

CROMPTON, J.—When once it is settled that a contract induced by fraud is not void, but voidable at the option of the party defrauded, it seems to me to follow that, when that party exercises his option to rescind the contract, he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into their original state before the contract. Now here I will assume, what is not clear to me, that the plaintiff bought his shares from the defendants and not from the Company, and that he might at one time have had a right to restore the shares to the defendants if he could, and demand the price from them. But then what did he buy? Shares in a partnership with others. He cannot return those; he has become bound to those others. Still stronger, he has changed their nature: what he now has and offers to restore are shares in a quasi corporation now in process of being wound up. That is quite enough to decide this case. The plaintiff must rescind in toto or not at all; he cannot both keep the shares and recover the whole price. That is founded on the plainest principles of justice. If he cannot return the article he must keep it, and sue for his real damage in an action on the deceit. Take the case I put in the argument, of a butcher buying

live cattle, killing them, and even selling the meat to his customers. If the rule of law were as the plaintiff contends, that butcher might, upon discovering a fraud on the part of the grazier who sold him the cattle, rescind the contract and get back the whole price: but how could that be consistently with justice. The true doctrine is, that a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition.

LORD CAMPBELL, C.J.—I will only say that I remain of the opinion which I expressed at the trial. The plaintiff, on his own shewing, cannot rescind the contract and sue for money had and received, but must seek his remedy by a special action for deceit. In that action, if he proves what he states, he will recover, not the original price, but whatever is the real damage sustained.

Rule discharged.

NOTE.—This case should be read in conjunction with the remarks made on it by McCardie J. in *Armstrong* v. *Jackson* [1917] 2 K.B. at p. 829. He thinks that the decision is correct because the plaintiff had changed the shares in a company on the cost-book principle into shares in a joint stock corporation, but that the dicta in the case, so far as they go beyond that ground, cannot be supported. Mere deterioration of the subject-matter does not, in McCardie J.'s opinion, destroy a right to rescind or prevent a restitutio in integrum. [Edd.]

'The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the Court of Equity most ordinarily deals are those of trustee and cestui que trust and such like. It applies specially to those cases, for this reason and this reason only, that from those relations the Court presumes confidence put and influence exerted. Whereas in all other cases where those relations do not subsist, the confidence and the influence must be proved extrinsically; but where they are proved extrinsically, the rules of reason and common sense, and the technical rules of a Court of Equity, are just as applicable in the one case as in the other.'—Per Lord Kingsdown in *Smith* v. *Kay* (1859) 7 H. L. C. at p. 779.

ALLCARD *v.* SKINNER (1887) 36 Ch. D. 145

APPEAL from a judgment of Kekewich, J.

LINDLEY, L.J.—In 1867 the Plaintiff was living with her mother in *London*, and on the recommendation of some clergymen the Plaintiff went to the Rev. Mr. *Nihill*, vicar of *St. Michael's, Finsbury*, for confession, and she asked him for work in his parish of *Shoreditch*. By him she was introduced to the Defendant Miss *Skinner*, who was then and is still the lady superior of the sisterhood of *St. Mary at the Cross*.

Shortly afterwards, that is, in 1868 the Plaintiff joined the sisterhood as an associate; and about this time she promised to devote her property to the service of the poor. She explained to him that she had not much property then but that she would have more, and she said she would bring all into the sisterhood. This promise Mr. *Nihill* tells us he considered binding upon her in conscience; and it is plain that the Plaintiff herself so considered it. But this promise was purely gratuitous, and it does not appear that the Plaintiff ever knew that the promise in question was not binding upon her in point of law; and her evidence shews that she did not realize its full meaning or the position she would find herself in if she should ever desire to leave the sisterhood. Such an event never occurred to her as one which could ever happen.

In 1870 the Plaintiff became a postulant, and later in the same year a novice, and finally in August, 1871, a sister. Each of these steps was accompanied by religious services and bound the Plaintiff more and more closely to the sisterhood, and alienated her more and more from the world at large.

When the Plaintiff became a postulant she ceased to reside with her mother and resided with the sisterhood, and whilst a postulant the Plaintiff made a will by which she left the whole of her property to the sisterhood. This was done at the request of the lady superior. The will when made was laid upon the altar and was regarded as a consecrated document. Why is not explained, and is left to inference. The only reason I can suggest for such a step is that it was intended to impress on the Plaintiff that she was doing a very solemn thing, and one which was never to be undone. The will, laid upon the altar and consecrated, would, I imagine, cease to be regarded by the Plaintiff and the lady superior as a revocable instrument.

The Plaintiff was twenty-seven years of age, or thereabouts, when she first joined the sisterhood. She sought Mr. *Nihill*: he did not seek her. She wished to join the sisterhood, and she was resolved to devote herself and her property to it and to charitable work. This wish and determination were naturally strengthened by the religious services of the sisterhood and by the influence of those around her. There is evidence that, when a novice, and before she became a sister, she wished to leave the sisterhood; but that she did not feel that she could do so, and that she felt even then bound to the sisterhood. After she became a sister she again wished to leave, but she was told by the lady superior that she could not do so, and that she was bound to the sisterhood for life. On another and later occasion she was not allowed to leave, although she wished to do so.

On becoming a sister the Plaintiff took vows of obedience to the lady superior and of poverty and chastity; and there can be no doubt that the Plaintiff regarded these vows as binding on her, not only when she took them but ever afterwards, until she finally left the sisterhood and became a Roman Catholic. On becoming a sister the Plaintiff also became subject to the rules of the sisterhood. These rules, although not reduced into their final shape until 1872 or 1873, were practically in force before,

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and were well known to the Plaintiff when she became a sister. The important rules are those which require (1.) Implicit obedience to the lady superior; (2.) Poverty. A third rule (No. xxxi.) is thus worded: 'Let no sister seek advice of any extern without the superior's leave.'

The vow of poverty and the rule as to poverty obliged each sister to give away all her property. But the rule did not require her to give it, or any of it, to the sisterhood. She could give it to her relations or to the poor if she wished. But it would be idle to suppose that a sister would not feel that she ought to give some of her property at least to the sisterhood; and it would be equally idle to suppose that she would not be expected to do so.

The forms of deeds in the Schedules A and B to the rules are very significant. The donee is inserted as '—— her heirs, executors, administrators, and assigns.' The introduction of *her* is very unusual in a legal form, and shews plainly enough who the donee was expected to be. Further, the deeds when filled up are by the rules to be placed on the altar, in order, I suppose, to add to their solemnity, and impress the donor with a sense of their irrevocability. The Plaintiff never executed any such deed as was contemplated by the rules; but they and the schedules shew what was expected to be done. In this particular case, moreover, the Plaintiff had expressly promised to give all she had to the sisterhood, and Mr. *Nihill* tells us that non-performance of this promise would have been regarded as dishonourable.

The vow and rule obliging to implicit obedience to the lady superior, and the exhortation or command to regard her voice as the voice of God, produce very different effects on different minds. There can, however, be no question that the Plaintiff felt bound by the vow and by the rule until she emancipated herself from both of them, which she did when she left the sisterhood.

It is important, however, to bear in mind that the fetter thus placed on the Plaintiff was the result of her own free choice. There is no evidence that pressure was put upon her to enter upon the mode of life which she adopted. She chose it as the best for herself; she devoted herself to it, heart and soul; she was, to use her own expression, infatuated with the life and with the work. But though infatuated, there is no evidence to shew that she was in such a state of mental imbecility as to justify the

inference that she was unable to take care of herself or to manage her own affairs.

The rule against obtaining advice from externs without the consent of the lady superior invites great suspicion. It is evidently a rule capable of being used in a very tyrannical way, and so as to result in intolerable oppression. I have carefully examined the evidence to see how this rule practically worked, but I can find nothing on the subject. I can find nothing to shew one way or the other what would have been the effect, for example, of a request for leave to consult a friend, or to obtain legal or other advice respecting any disposition of property, or respecting leaving the sisterhood. There, however, is the rule, and a very important one it is. I shall have occasion to refer to it again hereafter. Such being the nature of the vows and rules which the Plaintiff had taken, and to which she had submitted herself, and by which she felt herself bound by the highest religious sanctions, it is necessary to examine what she did with her property, and the circumstances under which she gave it to the sisterhood.

The evidence shews that her brother, who was one of her trustees, kept her fully informed of what her property consisted of, and he remitted to her from time to time cheques and transfers of railway stock and other securities to which she was entitled. The brother's letters and the cheques and transfers all passed through the hands of the lady superior, it being the rule that she should see all letters to sisters. The Plaintiff gave all the cheques to the lady superior, after indorsing them, and also transferred to her all the railway stock and securities as they were received. The cheques were handed over to Mr. *Nihill*, who was the treasurer of the sisterhood, and were paid by him into a bank to an account kept in his own name, and on which he alone could draw. The sisterhood was building an hospital in which the Plaintiff took great interest, and most of the Plaintiff's money was spent in defraying the expenses of the building. I have examined the evidence with care in order to see whether any pressure was put upon the Plaintiff in order to induce her to give her property to the sisterhood, or whether any deception was practised upon her, or whether any unfair advantage was taken of her, or whether any of her money was applied otherwise

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than *bonâ fide* for the objects of the sisterhood, or for any purpose which the Plaintiff could disapprove. The result of the evidence convinces me that no pressure, except the inevitable pressure of the vows and rules, was brought to bear on the Plaintiff; that no deception was practised upon her; that no unfair advantage was taken of her; that none of her money was obtained or applied for any purpose other than the legitimate objects of the sisterhood. Not a farthing of it was either obtained or applied for the private advantage of the lady superior or Mr. *Nihill*; nor indeed did the Plaintiff ever suggest that such had been the case. The real truth is that the Plaintiff gave away her property as a matter of course, and without seriously thinking of the consequences to herself. She had devoted herself and her fortune to the sisterhood, and it never occurred to her that she should ever wish to leave the sisterhood or desire to have her money back. In giving away her property as she did she was merely acting up to her promise and vow and the rule of the sisterhood, and to the standard of duty which she had erected for herself under the influences and circumstances already stated.

In May, 1879, the Plaintiff left the sisterhood, and on the 16th of that month she was received into the Roman Catholic Church, and she then regarded herself as freed from the vows she had taken on joining the sisterhood. Soon after she had left the sisterhood the Plaintiff had some conversation with her brother about getting her money back, and he said he did not want the trouble, and she had better leave it alone. She was also advised by a Roman Catholic priest not to trouble about it. In February, 1880, she consulted her present solicitor about making a new will, and she then had some conversation with him about the money she had given to the sisterhood, and he told her it was too large a sum to leave behind without asking for it back, and she said she would not trouble about it. Some time in 1884 the Plaintiff heard that another sister, a Miss *Merriman*, had left the sisterhood, and had asked for her money back, and had had it returned to her, and then the Plaintiff made up her mind to try and get her money back. Upon re-examination by Sir *C. Russell*, the Plaintiff said that she had no idea that she could get it back until after she had heard that Miss *Merriman* had recovered hers. But the evidence already alluded to shews clearly that she had

considered the matter, and had come to the conclusion that it was not worth troubling about. As a matter of fact, although she asked the lady superior in 1880 to give her back her will, she never asked for any of her money back until 1884, more than five years after she had left the sisterhood, and the present action was not brought until the 20th of August, 1885.

By her action the Plaintiff sought to recover the whole of the money back which she had given to the sisterhood, amounting to nearly £8500. Mr. Justice *Kekewich* tried the action, and gave judgment for the Defendant. From this judgment the Plaintiff has appealed, but she has limited her appeal to two sums of £500 and £1171, railway stock transferred by her to the lady superior, and still standing in her name.

Two questions are raised by the appeal, namely, 1st, Whether the gifts made by the Plaintiff to the sisterhood were revocable or irrevocable when made? 2nd, Whether, assuming them to have been revocable when made, it was competent for the Plaintiff to revoke them when she did?

The first question is one of great importance and difficulty. Its solution requires a careful consideration of the legal effect of gifts by persons of mature age who feel bound by vows and rules to give away their property, but who have taken the vows and submitted to the rules voluntarily and without pressure, and who are subject to no other coercion or influence than necessarily result from the vows and rules themselves, and from the state of their own mind.

There is no statutory law in this country prohibiting such gifts unless what is given is land or money to be laid out in land. These are provided for by the *Mortmain* and *Charitable Uses* Acts. But they have no application to this case. The common law, as distinguished from equity, does not invalidate such gifts as these. There being no duress or fraud, the only ground for impeaching such gifts at law would be want of capacity on the part of the donor; and although the Plaintiff was a religious enthusiast, no one could treat her as in point of law *non compos mentis*. There is no authority whatever for saying that her gifts were invalid at law. It is to the doctrines of equity, then, that recourse must be had to invalidate such gifts, if they are to be invalidated. The doctrine relied upon by the Appellant is the

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doctrine of undue influence expounded and enforced in *Huguenin* v. *Baseley* (14 Ves. 273) and other cases of that class. These cases may be subdivided into two groups, which, however, often overlap.

First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor. *Norton* v. *Relly* (2 Eden. 286), *Nottidge* v. *Prince* (2 Giff. 246), *Lyon* v. *Home* (Law Rep. 6 Eq. 655), and *Whyte* v. *Meade* (2 Ir. Eq. Rep. 420), all belong to this group. In *Whyte* v. *Meade* a gift to a convent was set aside, but the gift was the result of coercion, clearly proved. The evidence does not bring this case within this group.

The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to shew that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made. *Huguenin* v. *Baseley* was a case of this kind. The defendant had not only acquired considerable spiritual influence over the plaintiff, but was intrusted by her with the management of her property. His duty to her was clear, and it was with reference to persons so situated that Lord *Eldon* used the language so often quoted and so much relied on in this case. He said (14 Ves. 299): 'Take it that she (the plaintiff) intended to give it to him (the defendant): it is by no means out of the reach of the principle. The question is, not, whether she knew, what she was doing, had done, or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those, who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf.' This principle has been constantly recognised and acted upon in subsequent

cases, but in all of them, as in *Huguenin* v. *Baseley* (14 Ves. 273) itself, it was the duty of the donee to advise and take care of the donor. Where there is no such duty the language of Lord *Eldon* ceases to be applicable.

Rhodes v. *Bate* (Law Rep. 1 Ch. 252) was determined on the same principle as *Huguenin* v. *Baseley*, the Court having come to the conclusion that the relation of the defendant to the plaintiff was really that of a solicitor to his client.

I have not been able to find any case in which a gift has been set aside on the ground of undue influence which does not fall within one or other or both of the groups above mentioned. Nor can I find any authority which actually covers the present case. But it does not follow that it is not reached by the principle on which the Court has proceeded in dealing with the cases which have already called for decision. They illustrate but do not limit the principle applied to them.

The principle must be examined. What then is the principle ? Is it that it is right and expedient to save persons from the consequences of their own folly ? or is it that it is right and expedient to save them from being victimised by other people ? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction. *Huguenin* v. *Baseley* (14 Ves. 273) is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws ; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.

As no Court has ever attempted to define fraud so no Court has ever attempted to define undue influence, which includes one of its many varieties. The undue influence which Courts of

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Equity endeavour to defeat is the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is carried away by it, unless indeed such enthusiasm is itself the result of external undue influence. But the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of Equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence; and the Courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible. The Courts have required proof of its non-exercise, and, failing that proof, have set aside gifts otherwise unimpeachable. In this particular case I cannot find any proof that any gift made by the Plaintiff was the result of any actual exercise of power or influence on the part of the lady superior or of Mr. *Nihill*, apart from the influence necessarily incidental to their position in the sisterhood. Everything that the Plaintiff did is in my opinion referable to her own willing submission to the vows she took and to the rules which she approved, and to her own enthusiastic devotion to the life and work of the sisterhood. This enthusiasm and devotion were nourished, strengthened and intensified by the religious services of the sisterhood and by the example and influence of those about her. But she chose the life and work; such fetters as bound her were voluntarily put upon her by herself; she could shake them off at any time had she thought fit, and had she had the courage so to do; and no unfair advantage whatever was taken of her. Under these circumstances it is going a long way to hold that she can invoke the doctrine of undue influence to save her from the consequences of her own acts, and to entitle her to avoid the gifts she made when in a state of mind different from that in which she now is. I am by no means insensible of the difficulty of going so far.

Nevertheless, consider the position in which the Plaintiff had placed herself. She had vowed poverty and obedience, and she was not at liberty to consult externs without the leave of her

superior. She was not a person who treated her vows lightly; she was deeply religious and felt bound by her promise, by her vows, and by the rules of the sisterhood. She was absolutely in the power of the lady superior and Mr. *Nihill*. A gift made by her under these circumstances to the lady superior cannot in my opinion be retained by the donee. The equitable title of the donee is imperfect by reason of the influence inevitably resulting from her position, and which influence experience has taught the Courts to regard as undue. Whatever doubt I might have had on this point if there had been no rule against consulting externs, that rule in my judgment turns the scale against the Defendant. In the face of that rule the gifts made to the sisterhood cannot be supported in the absence of proof that the Plaintiff could have obtained independent advice if she wished for it, and that she knew that she would have been allowed to obtain such advice if she had desired to do so. I doubt whether the gifts could have been supported if such proof had been given, unless there was also proof that she was free to act on the advice which might be given to her. But the rule itself is so oppressive and so easily abused that any person subject to it is in my opinion brought within the class of those whom it is the duty of the Court to protect from possible imposition. The gifts cannot be supported without proof of more freedom in fact than the Plaintiff can be supposed to have actually enjoyed.

The case is brought within the principle so forcibly expressed by the late Lord Justice *Knight Bruce* in *Wright* v. *Vanderplank* (8 D. M. & G. 136), in which a gift by a daughter to her father was sought to be set aside. If any independent person had explained to the Plaintiff that her promise to give all her property to the sisterhood was not legally binding upon her, and that her vows of poverty and obedience had no legal validity, and that if she gave her property away and afterwards left the sisterhood she would be unable to get her property back, it is impossible to say what she might or might not have done. In fact she never had the opportunity of considering this question.

Where a gift is made to a person standing in a confidential relation to the donor, the Court will not set aside the gift if of a small amount simply on the ground that the donor had no independent advice. In such a case, some proof of the exercise of the

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influence of the donee must be given. The mere existence of such influence is not enough in such a case; see the observations of Lord Justice *Turner* in *Rhodes* v. *Bate* (Law Rep. 1 Ch. 258). But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift. So, in a case like this, a distinction might well be made between gifts of capital and gifts of income, and between gifts of moderate amount and gifts of large sums, which a person unfettered by vows and oppressive rules would not be likely to wish to make. In this case the Plaintiff gave away practically all she could, although, having a life interest in other property, she did not reduce herself to a state of poverty.

As I have already stated, I believe that in this case there was in fact no unfair or undue influence brought to bear upon the Plaintiff other than such as inevitably resulted from the training she had received, the promise she had made, the vows she had taken, and the rules to which she had submitted herself. But her gifts were in fact made under a pressure which, whilst it lasted, the Plaintiff could not resist, and were not, in my opinion, past recall when that pressure was removed. When the Plaintiff emancipated herself from the spell by which she was bound, she was entitled to invoke the aid of the Court in order to obtain the restitution from the Defendant of so much of the Plaintiff's property as had not been spent in accordance with the wishes of the Plaintiff, but remained in the hands of the Defendant. The Plaintiff now demands no more.

I proceed to consider the second point which arises in this case, namely, whether it is too late for the Plaintiff to invoke the assistance of the Court. More than six years had elapsed between the time when the Plaintiff left the sisterhood and the commencement of the present action. The action is not one of those to which the *Statute of Limitations* in terms applies; nor is that statute pleaded. But this action very closely resembles an action for money had and received where laches and acquiescence are relied upon as a defence: and the question is whether that defence ought to prevail. In my opinion it ought. Taking the statute as a guide, and proceeding on the principles laid down by Lord *Camden* in *Smith* v. *Clay* (3 Bro. C. C. 639, n.), and by

Lord *Redesdale* in *Hovenden* v. *Lord Annesley* (2 Sch. & Lef. 607, 630), the lapse of six years becomes a very material element for consideration. It is not, however, necessary to decide whether this delay alone would be a sufficient defence to the action. The case by no means rests on mere lapse of time. There is far more than inactivity and delay on the part of the Plaintiff. There is conduct amounting to confirmation of her gift. Gifts liable to be set aside by the Court on the ground of undue influence have always been treated as voidable and not void.

If authority for this proposition be wanted, such authority will be found in *Wright* v. *Vanderplank* (8 D. M. & G. 133) and *Mitchell* v. *Homfray* (8 Q. B. D. 587). Moreover, such gifts are voidable on equitable grounds only. A gift intended when made to be absolute and irrevocable, but liable to be set aside by a Court of Justice, not on the ground of a change of mind on the part of the donor, but on grounds of public policy based upon the fact that the donor was not sufficiently free relatively to the donee, such a gift is very different from a loan which the borrower knows he is under an obligation to repay, and is also different from a gift expressly made revocable and never intended to be absolute and unconditional. A gift made in terms absolute and unconditional naturally leads the donee to regard it as his own ; and the longer he is left under this impression the more difficult it is justly to deprive him of what he has naturally so regarded. So long as the relation between the donor and the donee which invalidates the gift lasts, so long is it necessary to hold that lapse of time affords no sufficient ground for refusing relief to the donor. But this necessity ceases when the relation itself comes to an end ; and if the donor desires to have his gift declared invalid and set aside, he ought, in my opinion, to seek relief within a reasonable time after the removal of the influence under which the gift was made. If he does not the inference is strong, and if the lapse of time is long the inference becomes inevitable and conclusive, that the donor is content not to call the gift in question, or, in other words, that he elects not to avoid it, or, what is the same thing in effect, that he ratifies and confirms it. This view is not only conformable to the well-settled rules relating to other voidable transactions (see the judgment in *Clough* v. *London and North Western Railway Company* (Law Rep. 7 Ex. 35)),

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but is also warranted by *Wright* v. *Vanderplank* (8 D. M. & G. 133) and *Mitchell* v. *Homfray* (8 Q. B. D. 587). It is true that in those cases the donors had died ; but it is clear, I think, that the decisions proceeded upon the ground that the donors, if alive, could not have obtained relief. A right to have a gift set aside for fraud or undue influence does not cease on the death of the donor but passes to his representatives ; and if in *Mitchell* v. *Homfray* the donor had been entitled when he died to have his gift set aside, his executors would have succeeded to his rights, and would have obtained the relief they sought. In this particular case the Plaintiff considered when she left the sisterhood what course she should take, and she determined to do nothing, but to leave matters as they were. She insisted on having back her will, but she never asked for her money until the end of five years or so after she left the sisterhood. In this state of things I can only come to the conclusion that she deliberately chose not to attempt to avoid her gifts but to acquiesce in them, or, if the expression be preferred, to ratify or confirm them. I regard this as a question of fact, and upon the evidence I can come to no other conclusion than that which I have mentioned. Moreover, by demanding her will and not her money, she made her resolution known to the Defendant.

It was urged that the Plaintiff did not know her rights until shortly before she asked for her money back. But, in the first place, I am not satisfied that the Plaintiff did not know that it was at least questionable whether the Defendant could retain the Plaintiff's money if she insisted on having it back. In the next place, if the Plaintiff did not know her rights, her ignorance was simply the result of her own resolution not to inquire into them. She knew all the facts ; she was in communication with her present solicitor in 1880, his remark that ' it was too large a sum to leave behind without asking for it back,' was a clear intimation to her that she ought to ask for her money back, and was a distinct invitation to her to consider her rights. She declined to do so ; she preferred not to trouble about it. Under these circumstances it would, in my opinion, be wrong and contrary to sound principle to give her relief on the ground that she did not know what her rights were. Ignorance which is the result of deliberate choice is no ground for equitable relief ; nor is it an

answer to an equitable defence based on laches and acquiescence. Again, it was urged that the Defendant has not been prejudiced by the delay, and that nothing has been done on the faith that the Plaintiff would not require her money to be returned to her. But I do not think this material. I treat the money as absolutely given to the sisterhood when the Plaintiff determined not to ask for it back, which she did in 1880. But, further, I cannot come to the conclusion that nothing has been done on the faith of the money being the property of the sisterhood. It is contrary to human nature to suppose that the Plaintiff's money was not for years regarded as the money of the sisterhood, and that the sisterhood did not act on that assumption and make their arrangements accordingly. Mr. *Nihill's* evidence satisfies me that they did so, although I do not think he shews that they took any particular step on the faith of having the particular sum now sought to be taken from them. It is not, however, in my opinion, necessary to prove so much as this. Whether the Plaintiff's conduct amounts in point of law to acquiescence or laches, or whether it amounts to an election not to avoid a voidable transaction, or whether it amounts to a ratification or a confirmation of her gifts, are questions of mere words which it is needless to discuss. In my judgment, it would not be fair or right to the Defendant to compel her now to restore the money sought to be recovered by this appeal. Nor, in my opinion, would such a result be in conformity with sound, legal, or equitable principles. Upon this ground, therefore, I am of opinion that this appeal ought to be dismissed.

[Bowen, L.J., delivered judgment to the same effect. Cotton, L.J., agreed that when the plaintiff left the sisterhood in 1879 she was entitled to set aside the transfer, and to have retransferred to her the fund still held by the defendant, but he thought that the delay which had occurred since 1879, though a good defence to any claim to the dividends received by the defendant before the commencement of the action, did not disentitle her to a retransfer of the stock in the hands of the defendant and to the dividends accrued since that date.]

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'You shall not stipulate for iniquity. All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again. You shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back. Procul O! procul este profani.'—Per Wilmot, C.J., in *Collins* v. *Blantern* (1767), 2 Wils. K. B. at p. 350.

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[THE following statement of facts is taken from the judgment of A. L. SMITH, L.J. :—

The plaintiff Scott applies to this Court to set aside a nonsuit which passed against him at the Guildhall. He asserts that there was evidence to go to the jury of his cause of action, which was for the rescission of a contract to purchase shares in a company about to be brought out and to be called the Steam Loop Company, and for the return of 632*l.* 3*s.* 5*d.*, paid thereunder to the defendants, upon the ground, amongst others, that the defendants, while acting as his brokers, had passed off their own shares to him instead of purchasing them upon the market. It appeared upon the plaintiff's own case that the plaintiff and the defendant McNab were jointly interested with others in bringing out this company and in floating its shares upon the market, and that the 632*l.* 3*s.* 5*d.* sought to be recovered in this action was paid by the plaintiff to the defendants in pursuance of an agreement come to between the plaintiff and the defendant McNab that McNab should therewith purchase 500 shares of the projected company, when brought out, at a premium (at the time of the agreement there was neither company nor market), the sole object of such purchase being that the public might thereby be induced to believe that there was a real market for the shares, and that they were at a real premium, whereas in truth and in fact, as the plaintiff and the defendant McNab well knew, they were not. Neither the plaintiff nor the defendants

would raise the point of the illegality of the transaction at the trial, and my brother Wright, who tried the case, made some strong comment upon their conduct, but did nothing further in the matter.]

The Court intimated the evidence adduced by the plaintiffs appeared to disclose a criminal conspiracy of which they ought to take judicial notice, and that they would take time to consider their judgment.

Cur. adv. vult.

LINDLEY, L.J.—My brother Smith has written a judgment in this case, which I have read, and in which I concur. As, however, the case is one of great importance, I will add a few observations on it myself.

Ex turpi causâ non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman* v. *Johnson* (Cowp. 343).

In this case the correspondence put in evidence by the plaintiff in support of the claim he made at the trial shews conclusively that the sole object of the plaintiff in ordering shares to be bought for him at a premium was to impose upon and to deceive the public by leading the public to suppose that there were buyers of such shares at a premium on the Stock Exchange, when in fact there were none but himself. The plaintiff's purchase was an actual purchase, not a sham purchase ; that is true, but it is also true that the sole object of the purchase was to cheat and mislead the public. Under these circumstances, the plaintiff must look elsewhere than to a court of justice for such

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assistance as he may require against the persons he employed to assist him in his fraud, if the claim to such assistance is based on his illegal contract. Any rights which he may have irrespective of his illegal contract will, of course, be recognised and enforced. But his illegal contract confers no rights on him: see *Pearce* v. *Brooks* (Law Rep. 1 Ex. 213). The illegal purpose of the plaintiff distinguishes this case from *Wetherall* v. *Jones* (3 B. & Ad. 221), and others of a similar kind. I am quite aware that what the plaintiff has done is very commonly done; it is done every day. But this is immaterial. Picking pockets and various forms of cheating are common enough, and are nevertheless illegal. The plaintiff was not entitled to judgment in the Court below, and he has no right to a new trial.

LOPES, L.J.—The defendants in both these actions are members of the London Stock Exchange. In December, 1890, they were brokers to a company called the Steam Loop Company, Limited. That company had issued a prospectus inviting subscriptions for its share capital, and the defendants had, previously to such issue, underwritten a part of such share capital, and were holders of a considerable number of shares in the company. The plaintiffs in the second action were solicitors to the company. The plaintiffs in both actions had instructed the defendants to purchase shares for them respectively in the company, and had duly paid for such shares. The plaintiffs in both actions sought to recover the price paid for such shares from the defendants upon the ground, amongst others, that instead of purchasing shares for them in the ordinary way, the defendants had transferred to the plaintiffs the defendants' own shares. The learned judge held that there was no evidence to go to the jury in support of the plaintiffs' case, and nonsuited them. In my judgment it is unnecessary to determine whether the holding of the learned judge is right in this respect. There is a preliminary matter to be considered, of which the learned judge might have taken, and this Court can and ought to take, judicial notice. The plaintiffs in both actions rely upon a contract contained in certain letters and telegrams passing between the plaintiffs and defendants, between December 6 and 9, 1890, and which are as follows:—[The Lord Justice then referred to the

letters and telegrams, and continued :—] I have read these letters and telegrams to shew what the nature of the transaction was. In my judgment it was an agreement between the plaintiffs and defendants to induce would-be buyers of shares in this company, contrary to the fact, to believe there was a market for its shares, and that the shares were of greater value than they really were. Putting it shortly—an agreement to cheat the public by leading them to believe the shares had a value, which the plaintiffs and defendants knew they had not, and thus inducing them to become purchasers. Is such a transaction illegal ? I am of opinion that it is, and might be made the subject of an indictment for conspiracy.

Rex v. *Berenger* (3 M. & S. 67) is an authority on this subject. It was an indictment for conspiracy by false rumours to raise the price of the public government funds with intent to injure those who should purchase, and Ellenborough, C.J., said (p. 72) :—

' A public mischief is stated as the object of this conspiracy ; the conspiracy is by false rumours to raise the price of the public funds and securities ; and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, for the parties had not been able to carry it into effect. The purpose itself is mischievous : it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price, by means of false rumours, it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day.'

I can see no substantial distinction between false rumours and false and fictitious acts ; the price of the shares in this case was artificial, and the premium unreal and nominal, to the knowledge of all parties concerned, put forward to induce the public to take shares, with which otherwise they would have had nothing to do.

Again, in *Reg.* v. *Aspinall* (1 Q. B. D. 730 ; 2 Q. B. D. 48) it was held that an agreement to cheat and defraud by means of false pretences those who might buy shares was an indictable offence. Brett, L.J., said (2 Q. B. D. 59) :—

' If the second count in this indictment contains averments sufficiently stated which are enough to show sufficiently that the

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defendants unlawfully—namely, with minds intending to do wrong—agreed by false pretences to cheat and defraud those who might buy shares in the company, it sufficiently alleges a criminal conspiracy.'

I entertain no doubt that the agreement on which the plaintiffs rely is an illegal agreement. If the agreement is illegal, the question arises, whether the plaintiffs are not disentitled to recover, and whether they have not forfeited the relief which a court of law in other circumstances would have afforded them. *Begbie* v. *Phosphate Sewage Co.* (Law Rep. 10 Q. B. 491) is conclusive on this point. It was an action for money had and received, plea never indebted, and it was held that the plaintiff could not recover because he was aware that no exclusive right to use the process in question could be obtained, and had entered into the contract with the defendants in contemplation of a fraud upon the shareholders of the intended company. Cockburn, C.J., said (p. 499) :—

'Another ground of defence insisted on is that the money having been paid for the purpose of defrauding the intended shareholders, by holding out to them the assurance of an exclusive right to use the process in question, as an inducement to contribute their money, when it was known to the parties engaged in getting up the new company that no exclusive right existed, or could be obtained, the plaintiff cannot maintain an action to recover back the money on the well-established principle that money paid in furtherance of a fraud or other unlawful purpose cannot be recovered back. . . . Under these circumstances we are of opinion that the money sought to be recovered in this action having been paid in order to obtain from the defendants the agreement whereby this fraud could be carried out, the rule of law insisted on by the defendants applies, and is a bar to the plaintiff's right to recover. The case falls immediately within the principle of the decisions in *Simpson* v. *Bloss* (7 Taunt. 246) ; *Jones* v. *Yates* (9 B. & C. 532), and *Fivaz* v. *Nicholls* (2 C. B. 501). The plaintiff cannot present his case to a jury without necessarily disclosing the unlawful purpose in furtherance of which this money was paid.'

Every word of that judgment applies. It is to be observed that the illegality of the contract was not pleaded. The point

was taken by the court and acted upon. The plaintiffs cannot, and do not, in this case more than in that, present their case to the jury without necessarily disclosing the unlawful purpose in furtherance of which the contract was entered into. The plaintiffs, therefore, in my opinion, are disentitled to relief, and on this ground the appeal must be dismissed.

A. L. SMITH, L.J. [after stating the facts as above, proceeded as follows:—] If two or more persons agree to cheat and defraud others by means of deceit and fraud, there can be no doubt that each and all are indictable for a criminal conspiracy at common law. It has been held that it is a criminal conspiracy for two or more to agree by false rumours to endeavour to raise the price of the public funds on a particular day: *Rex* v. *Berenger* (3 M. & S. 67). It has also been held in *Reg.* v. *Aspinall* (1 Q. B. D. 730; 2 Q. B. D. 48) that an agreement by two or more to cheat and defraud by means of false pretences those who might buy shares in a company was an indictable conspiracy. False pretences here do not mean such false pretences as would support an indictment for obtaining money or goods by false pretences. See *Reg.* v. *Hudson* (Bell, C. C. 263). Lopes, L.J., has gone fully into the correspondence; but the telegram and letter of December 6, 1890, from the defendant McNab to the plaintiff, the letter of December 7, 1890, from the plaintiff to Slaughter, and of December 8, 1890, from Slaughter to McNab, in my judgment, are sufficient. These documents contain conclusive proof that the plaintiff and McNab agreed together to cheat and defraud those who might buy shares in the company, by leading them to believe that the shares were at a genuine premium in the market, whereas to their knowledge they were not, the fictitious premium being sought to be brought about by means of the purchases to be made with the plaintiff's 632*l.* 3*s.* 5*d.* by McNab, and which were to be made for the sole purpose of creating such fictitious premium. These documents were read by the plaintiff's counsel when he opened his case, as shewing the purposes for which the plaintiff, and the defendant McNab, had agreed that the purchases should be made. The agreement between two or more to do an illegal act has been proved.

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The next question is, Was it shewn that the plaintiff and McNab agreed to carry out this intention by illegal means—viz., by deceit and fraud? For, if so, there can be no possible doubt that an indictable conspiracy has been committed—viz., the agreement to do an illegal act by illegal means. It is not necessary in this case to discuss whether the whole of this must be proved to constitute an indictable conspiracy. It is said for the plaintiff that there was nothing deceitful or fraudulent in the fact of his paying his 632*l.* 3*s.* 5*d.* to McNab to purchase shares with upon the open market, and if that had been all I agree; but the question is, Was the payment made as it was for the sole purpose of creating therewith a fictitious premium, in order to induce the public to purchase shares in the company, and thereby benefit the plaintiff and McNab at the expense of the buyer—a deceitful and fraudulent means whereby to cheat and defraud those who might buy shares in the company?

I am of opinion that it was.

Test it in this way. Suppose a purchaser induced to purchase shares of the plaintiff or McNab by means of the fictitious premium created by them solely for the purpose of inducing such purchaser and others to buy, could he or not have successfully sued either or both for a false and fraudulent misrepresentation? I say that he could, and this is another way of stating the same proposition—viz., that the plaintiff and McNab agreed by means of deceit and fraud to cheat and defraud the would-be purchasers of shares. The agreement to do an illegal act by illegal means is proved, and for the reasons above both the plaintiff and McNab were liable to be indicted for conspiring to cheat and defraud.

Now, how does the law stand upon the subject? If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action. This was decided in *Taylor* v. *Chester* (Law Rep. 4 Q. B. 309), where the illegality was pleaded, and also in *Begbie* v. *Phosphate Sewage Co.* (Law Rep. 10 Q. B. 491), where it was not pleaded, but, the fraud being apparent, the Court would not interfere. When the plaintiff's statement of claim is looked at it will be seen that he there states the purposes for which he handed the money to the defendants—viz., to 'keep up the price of the shares,' which

upon the evidence was shewn to be ' to create a fictitious premium.'

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In my judgment, the plaintiff, when suing the defendants for breach of contract, as he does, has to prove the whole contract, and it was not competent for him to put in evidence only half of the contract, and he did not do so, for the letters above read were opened by his learned counsel as part of his case. Immediately the whole contract upon which the plaintiff sues is put in, the illegality of the conduct of the plaintiff and of McNab at once becomes apparent. In my opinion, the maxim ' In pari delicto potior est conditio possidentis ' applies, and this Court ought not to assist the plaintiff when he seeks to recover the 632*l.* 3*s.* 5*d.* back from the defendants. Upon these grounds, and without going further into the case, this appeal must be dismissed, and with costs.

Appeal dismissed.

' The main point here is whether this note is brought within the category of notes tainted with illegality in their inception by showing that it was given in payment of a wager on the hop duty. I am of opinion that it is not so tainted. A party without violating the common law may make such a wager and may pay the money if he lose it; and if instead of paying the bet he gives a note promising to pay at a future date, he still violates no statute.'—Per Erle, J., in *Fitch* v. *Jones* (1855) 24 L. J. Q. B. at p. 296.

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LILLEY *v.* RANKIN (1886) 56 L. J. Q. B. 248

RANKIN *v.* LILLEY AND BAIRD

This was a motion to set aside a verdict obtained by the plaintiff, and for a new trial, on the ground that such verdict was against the weight of evidence and that there was misdirection on the part of the learned Judge.

The plaintiff's claim was for 1,800*l.*, upon two promissory notes for 1,000*l.* and 800*l.* given by the defendant to one Baird and indorsed by him to the plaintiff for value.

It appeared that the defendant was dealing on the Stock Exchange, and employed Baird as an outside broker to conduct dealings in stocks and shares which were admittedly gambling transactions. The plaintiff was a jobber and was employed by

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Baird to carry out the transactions of the defendant. The plaintiff and Baird carried on business in two adjoining rooms at 10 Throgmorton Avenue; they had also a telephone between them, they had books in common, and shared commissions made by their dealings.

In August, 1885, Baird's account with the defendant shewed a balance due to Baird of over 2,000*l.*, for moneys due to cover the differences in prices of stock which had been purchased for him. Defendant then gave Baird two promissory notes for 1,000*l.* and 800*l.* each. At this time, Baird, being indebted to the plaintiff to a much larger amount, indorsed over to him the two promissory notes which the defendant had given.

The defendant brought in Baird as a third party, and, by way of counterclaim brought a cross action against the plaintiff and Baird for a conspiracy to defraud him, alleging that when he took the notes he was aware of their having been given in respect of gambling transactions.

At the trial before Manisty, J., and a special jury, the Judge nonsuited the defendant in his cross action against Baird, and the jury found that the transactions between the plaintiff and Baird were *bona fide*, and that the plaintiff gave consideration for the notes.

HUDDLESTON, B.—This was an application for a new trial upon two grounds—first, that the verdict was against the weight of the evidence; and, secondly, on the ground that the learned Judge misdirected the jury.

With reference to the first point, I do not think Mr. Horne Payne seriously suggested that there was upon the facts any unreasonable finding by the jury. What were those facts? They were shortly as follows: Rankin was a gentleman who with his eyes open transacted this business, and honestly avowed that he was given to gambling transactions, and he employed Baird, who was in the position of an outside broker, to carry out these gambling transactions. The jury were thus dealing with a man who did this sort of thing with his eyes open, and Baird was employed to carry out his designs. Now Rankin's complaint is that Baird closed his accounts too soon; but Baird was under no obligation to keep them open, and it would indeed have been

unreasonable to have expected him to have done so without security. Baird was therefore perfectly justified in acting as he did; accordingly in the cross action by Rankin, to which a claim against Baird was added, Rankin was properly nonsuited, there being really no case against Baird. Now Lilley was a jobber, and employed by Baird to carry out Rankin's transactions. It was said that the relationship between Lilley and Baird was full of suspicion; they had offices adjoining, and the use of a telephone and books in common—facts from which the jury might, if they pleased, have inferred that they were acting in concert for the purpose of defrauding Rankin. But what the jury did find was that Lilley had advanced over 10,000*l.* to Baird, for which Baird was pressed by Lilley to give some security, and that accordingly the notes in respect of which the present action was brought were handed over to Lilley. In other words, the jury found that the transaction was a perfectly honest one, and that the only relationship between Lilley and Baird were those of broker and jobber, and that there was good consideration for the notes. But Mr. Horne Payne says that there was misdirection by the learned Judge in two respects—first, because the learned Judge did not ask the jury whether as between Lilley and Baird the transactions which took place were not gambling transactions; and secondly, because the Judge, though urged to do so, declined to ask the jury whether Lilley, when he took the notes from Baird, had notice of the nature of the transaction between Rankin and Baird.

With reference to the first complaint the question, no doubt, was not put to the jury; but the learned Judge was not asked to put it. But if the question had been put, the jury, having made up their mind that the transactions between Lilley and Rankin were *bona fide*, would no doubt have answered that the notes were not given in furtherance of gambling transactions. Therefore, even if there was misdirection, the Court would clearly not be justified in granting a new trial, having regard to the provisions of Order xxxix. rule 6.

As regards the other point—namely, that the Judge should have asked the jury whether Lilley had knowledge of the circumstances under which the notes were given—that point would have been a good one if the transactions between the two had been

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illegal and not void only. The statute 9 Anne, c. 14[1] avoided bills and notes given for certain purposes, and by 5 & 6 Will. 4. c. 41. s. 1 such notes were to be deemed not merely void but as given for an illegal consideration. Therefore, if these notes had come within the provisions of 9 Anne, c. 14, the statute 5 & 6 Will. 4. c. 41 would have made them illegal; but they do not, and 8 & 9 Vict. c. 109. s. 18 merely enacts that contracts by way of gaming and wagering shall be void and not recoverable by legal process. It is not necessary to go through the various authorities. *Fitch* v. *Jones* ((1855) 5 E. & B. 238) is supported by *Beeston* v. *Beeston* ((1875) L. R. 1 Ex. D. 13), and the former expressly decides that it is no defence to an action of this kind to shew that Lilley was aware of the circumstances under which the notes were given, if consideration was given for them. There is no doubt that my brother Manisty declined to put this question to the jury, and I think he was right in his refusal to do so; but even if he were wrong, his omission would not prejudice the defendant, having regard to all the circumstances. This motion must therefore be refused, with costs.

SMITH, J., delivered judgment to the same effect.

The Gaming Act, 1710. 9 Anne c. 14

Whereas the laws now in force for preventing the mischiefs which may happen by gaming have not been found sufficient for that purpose. Therefore for the further preventing of all excessive and deceitful gaming, *Be it enacted* that from and after the first day of May, 1711, all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever given granted drawn or entered into or executed by any person or persons whatsoever where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming or playing at cards, dice, tables, tennis, bowles or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid or that shall during such play [so play] or bett shall be utterly void, frustrate and of none effect to all intents and purposes whatsoever, any statute, law or usage to the contrary thereof in any wise notwithstanding. . .

[1] See note at the end of this case. [Edd.]

The Gaming Act, 1835, 5 & 6 Will. 4. c. 41

§ 1. . . . Every note bill or mortgage which if this Act had not been passed would by virtue of [certain recited Acts especially 16 Car. II. c. 7 and 9 Anne, c. 14] have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration . . .

§ 2. In case any person shall make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the hereinbefore recited Acts . . . declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of His Majesty's courts of record.[1]

'There is a broad principle that where a defendant is attempting to set aside a transaction for illegality, and the facts connected with it are equally consistent with the transaction being legal or illegal, it lies on the defendant to prove the illegality. The law presumes against illegality. The principle is, as laid down by Mr. Best, that no person shall in the absence of criminative proof be supposed to have committed any violation of the criminal law, whether malum in se or malum prohibitum, and that this presumption holds in all civil and other proceedings for whatever purpose originated, and whether the guilt of the party comes in question directly or collaterally, and as far as I know this principle is always acted on in the courts.'—Per Bowen, L.J., in *Hire Purchase Furnishing Co.* v. *Richens* (1887) 20 Q. B. D. at p. 389. WAUGH v. MORRIS.

'It is clear law that where a contract can be performed in two ways, one legal, the other illegal, it is not avoided unless there is an intention to perform it in the illegal way.'—Per Scrutton, L.J., in *Central India Mining Company* v. *Société Coloniale Anversoise* [1920] 1 K. B. at p. 771.

WAUGH *v.* MORRIS (1873) L. R. 8 Q. B. 202

The judgment of the Court (COCKBURN, C.J., BLACKBURN and MELLOR, JJ.) was delivered by

BLACKBURN, J.—This is an action brought by the owner of a ship against the charterer for detaining the ship, in which the plaintiff has obtained a verdict, subject to leave to move to enter the verdict for the defendant, if the facts proved establish a plea of illegality.

On the trial before the Lord Chief Justice the material facts

[1] This section is repealed by the Gaming Act, 1922.

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appeared to be, that the charterparty was made in France on the 7th of October, 1871, between the agent of the defendant and the master of the ship.

By the charterparty it was stipulated that the ship, then at Trouville, a port in France, should there load a cargo of pressed hay and proceed therewith direct to London ; and a term in the charterparty was to the effect that all cargo should be brought and taken from the ship *alongside*.

The defendant's agent verbally told the master that the consignees would require the hay to be delivered to them at a particular wharf in Deptford Creek, and that he should proceed there on his arrival in London, and this the master promised to do.

On arriving in the Thames the master proposed to proceed to the wharf, but then for the first time learned that by an Order in Council, made under the authority of the Cattle Diseases Act, France was declared to be an infected country, and it was made illegal to *land* in Great Britain any hay brought from that country. He could not therefore proceed to the wharf and there deliver the cargo, for that would have been landing the hay, and illegal. After some delay the defendant received the cargo from alongside the ship in the river into another vessel and exported it. There was no legal objection to this being done, but during the interval eighteen days beyond the lay-days elapsed, and it was for this detention that the plaintiff recovered.

It appeared that the order in Council had been made and published before the charterparty was entered into, but that in fact neither the master of the ship nor the defendant's agent was aware that it had been made.

A rule was obtained, which was argued in Michaelmas term before my Lord Chief Justice, my Brother Mellor, and myself, when the Court took time to consider.

We are of opinion that the rule should be discharged. The charterparty provides that the cargo was to be taken from alongside ; and that being so, the consignee might select any legal and reasonable place within the port at which to take it from alongside. He, by his agent in France, named this wharf, which he supposed, erroneously, to be a legal place, and the master, under the same mistake, assented to this, as indeed he would have had no right to refuse, if it had really been a legal place. But when

it turned out that the defendant had named a place for the performance of the contract where the performance was impossible, because illegal, that did not put an end to the contract, if the performance in any other way was legal and practicable. In the present case the performance by receiving cargo alongside in the river without landing it at all was both legal and practicable. See *The Teutonia* (Law Rep. 4 P. C. 171), a case which would have been precisely in point, if the Order in Council rendering the landing illegal had come into operation after the contract was made instead of before.

It was on the fact that the Order in Council existed at the time the contract was made that the argument for the defendant was mainly grounded.

It was said that the intention of both parties was, that the hay was to be landed, that therefore they intended to violate the law, and that it may be shewn by extraneous evidence that a contract, on the face of it perfectly legal, is void because made with intent to violate the law, and that ignorance of the law makes no difference. But we think, in the first place, that it is a mistake to say that the plaintiff intended that the hay should be landed. He no doubt contemplated and expected that the hay would be landed, for, except under very unusual circumstances, hay is not brought into the Thames for any other object ; but all that the shipowner bargained for, and all that he can properly be said to have intended, was that, on the arrival of the ship in London, his freight should be paid, and the hay taken out of his ship. If, unexpectedly, there had arisen a great demand for hay abroad, like that which existed when our army was in the Crimea, the consignee might have transhipped the hay and exported it without the shipowner having the slightest ground for complaining that his intention was frustrated. We agree that a contract, lawful in itself, is illegal if it be entered into with the object that the law should be violated ; if, as it is expressed in *Pearce* v. *Brooks* (Law Rep. 1 Ex. 213), it is done for the very object of satisfying an illegal purpose, or, as it is expressed in *McKinnell* v. *Robinson* (3 M. & W. at p. 442), ' for the express purpose of a violation of the law.' But in the present case the shipowner never did even contemplate or believe that the defendant would violate the law. He contemplated that the defendant would land the goods which

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he thought was lawful; but if he had thought at all of the possibility of the landing being prohibited, he would probably have expected that the defendant would in that case not violate the law. And he would have been right in fact in that expectation, for the defendant did not attempt to land the goods.

We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to shew that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance.

No one could for a moment contend, that if everything which happened in France had happened within the jurisdiction of our country, the plaintiff and defendant's agent could have been successfully indicted for a conspiracy to violate the law by landing these goods: for there would have been a want of mens rea. And it seems to us that the mens rea is as necessary to avoid a contract, which can be legally performed, because when it was made it was with the object of satisfying an illegal purpose, as it is to render the parties criminally responsible.

Rule discharged.

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'It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the Common or Statute Law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a Statute, though the Statute inflicts a penalty only, because such a penalty implies a prohibition. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference in point of law whether the Statute which makes it so has in view the protection of the revenue or any other object. The sole question is whether the Statute means to prohibit the contract.'—Per Parke, B., in *Cope* v. *Rowlands* (1836) 2 M. & W. at p. 157.

VICTORIAN DAYLESFORD SYNDICATE LTD. *v.* DOTT [1905] 2 Ch. 624

Action.

The plaintiffs in this case were a company-promoting syndicate called the Victorian Daylesford Syndicate, Limited, and Mr. G. R. Bonnard, a director of the syndicate. The defendant carried on

business in the City of London as a money-lender, but had not registered his name under the Money-lenders Act, 1900. He now admitted, for the purposes of the action, that he was a money-lender within the meaning of the Act.

In March, 1904, the plaintiff syndicate, and Mr. Bonnard on its behalf, obtained an advance of 500*l.* from the defendant, for which the latter received a bill of exchange payable one month after date, drawn on behalf of the syndicate by Mr. Bonnard and Mr. Dillon, another director, for 525*l.*, and accepted by the Victorian Cornish Gold Mines Company, Limited; and the defendant also received 100 fully paid shares of 1*l.* each in the Victorian Cornish Company as a bonus for the advance, together with an option to purchase from the syndicate 500 more of the shares at 7*s.* 6*d.* each within a specified period. The bill of exchange was renewed monthly seven times, and on each renewal the defendant received 25*l.* in cash as a bonus—equivalent to 60 per cent. per annum interest on the loan—together with a transfer of 100 further fully paid shares of 1*l.* each in the Victorian Cornish Company, and the option to purchase 500 more similar shares at 7*s.* 6*d.* each within a specified period. In all the defendant received from the plaintiffs in respect of the advance of 500*l.* not only the bill of exchange for 525*l.*, but also by way of bonuses on renewals 175*l.*, together with 800 fully paid shares of 1*l.* each in the Victorian Cornish Company, and options to purchase at 7*s.* 6*d.* further similar shares, which were still in force to the extent of about 3000 shares. The shares were now worth not less than 15*s.* each. On December 23, 1904, the syndicate paid to the defendant the full amount of the bill of exchange, and he in return handed over the bill and 2000 fully paid shares in the Victorian Cornish Company which he held as collateral security therefor. The defendant had sold 400 of the shares for 303*l.* 13*s.* 9*d.*, and still retained 400 shares.

The plaintiffs brought this action alleging that the transactions were harsh and unconscionable and claiming to have them re-opened, an account, and that the amount fairly due by them might be adjudged by the Court and the defendant ordered to repay the excess received by him; that the defendant might be restrained from dealing with the shares or exercising the options, might be ordered to return the shares, and that such of the

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options as had been obtained by excessive charges might be cancelled.

The defendant denied that the charges were excessive. He alleged that the shares in the Victorian Cornish Company were speculative in value, and that the plaintiffs were shrewd men of business, and had in fact proposed the terms themselves. He counter-claimed for specific performance of the contracts to deliver to him 3000 shares at 7*s.* 6*d.* per share.

BUCKLEY, J.—The defendant in this case is, and at the dates relevant to the cause of action was, a money-lender, and he is not, and at those dates was not, registered under the Money-lenders Act, 1900. On March 31, 1904, he lent 500*l.* upon certain terms under which he has received the following sums: first, the repayment on December 23, 1904, of his 500*l.*; secondly, sums amounting to 503*l.* 13*s.* 9*d.* in cash; thirdly, 400 fully paid shares of 1*l.* each in the Victorian Cornish Gold Mines, Limited, equivalent, at 15*s.* a share, to 300*l.*; and, fourthly, he claims to be entitled, under options which he says he has exercised, to 3000 like shares at the price of 7*s.* 6*d.* Taking these to be worth 15*s.* a share, this is equivalent to 1125*l.* The outcome of this is that for a loan of 500*l.* made on March 31 and repaid on December 23 the defendant will have received, if he succeeds in holding the bargain, the aggregate value of 503*l.* 13*s.* 9*d.*, 300*l.*, and 1125*l.*, making together 1928*l.* 13*s.* 9*d.* This 1928*l.* 13*s.* 9*d.* is the interest for the advance of 500*l.* for roughly nine months. The value is in fact more than the 1928*l.*, for the shares are quoted at more than 15*s.*

The plaintiffs say two things—first, that the defendant being a money-lender not registered under the Money-lenders Act, 1900, the contract is void; and, secondly, that even if that is not so, the terms are harsh and unconscionable.

Upon the first question the relevant provisions of the Act are two [1]—namely, first, that a money-lender, which this defen-

[1] Section 2 of the Money-lenders Act, 1900, is as follows:—
(1.) A money-lender as defined by this Act—
(*a*) shall register himself as a money-lender in accordance with regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender; and

dant is, must register himself under the Act; and, secondly, that he shall not enter into any agreement in the course of his business as a money-lender otherwise than in his registered name. Mr. Matthews, for the defendant, argues that inasmuch as the defendant has not complied with the first of those provisions, he is not amenable to the second; that he escapes altogether from the provision of the Act that he shall not enter into any agreement in the course of his business as a money-lender otherwise than in his registered name by failing to comply with the provision of the Act that he shall have a registered name. I am unable to adopt that argument. The argument is rested upon this: it is said, and truly, that sub-s. 3 of s. 2 requires that, if a money-lender is prosecuted under sub-clause 1 (*a*), that is to say, for not registering himself, the consent of the law officer of the Crown must be obtained, and that a like consent is not required for a prosecution under sub-clause 1 (*c*). I do not know, but I can easily understand, that the intention of the Act may be this—that it might be a hardship upon a person to prosecute him for non-registration as a money-lender, when the fact in debate might be the very difficult one whether he is or is not a money-lender within the Act, unless the consent of the law officer of the Crown is obtained, whereas if that is not the question, but he is

(*b*) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address; and

(*c*) shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name; and

(*d*) shall on reasonable request, and on tender of a reasonable sum for expenses, furnish the borrower with a copy of any document relating to the loan or any security therefor.

(2.) If a money-lender fails to register himself as required by this Act, or carries on business otherwise than in his registered name, or in more than one name, or elsewhere than at his registered address, or fails to comply with any other requirement of this section, he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding one hundred pounds, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both: Provided that if the offender be a body corporate that body corporate shall be liable on a second or subsequent conviction to a fine not exceeding five hundred pounds.

(3.) A prosecution under subsection (1) (*a*) of this section shall not be instituted except with the consent in England of the Attorney-General or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland. [Edd.]

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prosecuted for the offence of failing to contract in his registered name, the same reason does not apply. That may be the meaning; I do not know. Mr. Matthews' contention, however, goes to a different point. He contends that sub-clause 1 (*c*) relates only to the contract of the registered money-lender when he contracts otherwise than in his registered name. I think the contention is not supported by the provisions of the Act. If the unregistered money-lender be prosecuted, whether under (*a*) or (*c*), it would be necessary to aver that he was a money-lender, and an issue of fact might be whether he was a money-lender or not. If that issue did arise, it may be that the consent of the law officer would be necessary. It is unnecessary for me to determine that. That will have to be determined if ever any such prosecution should be instituted. To my mind it does not at all follow as a matter of construction of the Act that sub-clause 1 (*c*) does not apply to the contract of an unregistered money-lender. In my opinion it does. It follows from this that the defendant has committed a breach of that clause of the Act of Parliament which requires him, he being a money-lender, to contract in the course of his business as a money-lender in a registered name.

The next question is whether the Act is so expressed that the contract is prohibited so as to be rendered illegal. There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. I have to see whether the contract is in this case prohibited expressly or by implication. For this purpose statutes may be grouped under two heads—those in which a penalty is imposed against doing an act for the purposes only of the protection of the revenue, and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public. That distinction will be found commented upon in numerous cases, including those which have been cited of *Cope* v. *Rowlands* (2 M. & W. 149; 46 R. R. 532) and *Fergusson* v. *Norman* (5 Bing. N. C. 76; 50 R. R. 613). Parke B. in the former case (2 M. & W. 158) says the question to determine is whether the Act is 'meant *merely* to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it? or whether *one* of its objects be the protection of the public, and the prevention of *improper*

persons acting as brokers?' If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute, and is illegal. I desire to point out that the present case is one that is upon this point abundantly plain. There is no question of protection of the revenue here at all. The whole purpose is the protection of the public. The money-lender has to be registered, and has to trade in his registered name obviously and notoriously for the protection of those who deal with him. The purpose is a public purpose, and therefore upon all the authorities the act for the doing of which a penalty is imposed is an act which is impliedly prohibited by the statute, and is consequently illegal. The short effect of the statute, as it seems to me, is this—that it provides that a money-lender's contract must be in that money-lender's registered name; otherwise a penalty is imposed upon him, the result being that the act done is an act forbidden by statute, and is illegal. There is another consideration. Not a bad test to apply is to see whether the penalty in the Act is imposed once for all, or whether it is a recurrent penalty imposed as often as the act is done. If it be the latter, then the act is a prohibited act. Now here the penalty is imposed every time the act is done. Further, the Act goes on to provide that on a second or subsequent conviction a man may be imprisoned with or without hard labour for a term not exceeding three months. The act is an illegal act.

For these reasons I come to the conclusion that the contract under which the defendant was to receive certain sums was an illegal contract on which he cannot sue. The result is that his counter-claim fails, and I dismiss it with costs.

In the action the plaintiffs say that they do not wish to rely upon the non-registration of the defendant; that they are desirous that the man should have what is a fair return for his money; and they ask me to act upon s. 1 of the Act, and find what is fairly due. I cannot put myself in that position. I have held that the contract is void. I cannot then set myself to see whether under the Act of Parliament I ought to set it aside, because there is nothing to set aside, and I cannot say how its terms ought to be reduced, because there are no terms to reduce. But in case this should go further, and the Court of Appeal

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should want to know what my judgment is upon the facts, so far as they are material on this part of the case, I will add this. There is a dispute of fact between Mr. Bonnard and Mr. Dott as to what passed when the bargain was originally made. Mr. Bonnard says that Mr. Dott represented himself as being unable himself to advance the money, but as knowing a Mr. Richard Webster (who, according to Mr. Matthews' case, did not exist), who was willing to lend the money on the terms that he should have 60 per cent. (25*l.* a month) and certain fully paid shares, and that Dott said that he himself, Dott, as his remuneration would want a call on 500 fully paid shares in the Victorian Cornish Company upon the terms that were agreed. Dott says that is not so—that no Mr. Richard Webster was ever mentioned at all. On that question of fact I think that Mr. Bonnard is speaking the truth, and that Mr. Dott is not. There are other cases in which Mr. Dott professed himself unable to find the money. I have to consider whether or not he is likely to have done so in the present case. One consideration which should be borne in mind in determining whether or not this was a harsh and unconscionable transaction is, I think, that the original bargain was obtained by a misstatement as to how the payments which were to be made for the loan were to be shared as between Dott and the supposed Mr. Richard Webster.

Another matter which should be borne in mind is this—that Dott was certainly getting all the liability of the Cornish Company, such as it was; and was getting the liability, such as it was, of Bonnard and Dillon, who signed the note; and was getting the security of 2000 fully paid shares in the Victorian Cornish Company. That is a strong element in estimating the risk run by the defendant. On the other hand, it is necessary to bear in mind that, except in the particulars which I have stated, the terms were not, so far as I see, extorted from Mr. Bonnard. He was willing to pay for a transaction, which no doubt was not one of ordinary money-lending, in which there might be considerable risk. All those are matters which should be borne in mind. If I had had to estimate as best I could what would have been a fair return for the money, I should not I think have arrived at any larger figure than that which the plaintiffs are willing to concede. The plaintiffs say this: 'We do not seek to

get back the 25*l.* a month, viz., the 60 per cent. on the 500*l.*; let him keep that.' I can put this into the order: 'The plaintiffs voluntarily offering to allow the defendant to retain the 60 per cent., order the defendant to repay the other sums, and to restore the shares.' I believe all the figures are agreed between the parties, and, subject to any error of arithmetic which I may myself have made, it seems to me that there will be an order for the repayment of 303*l.* 13*s.* 9*d.*; and an order to retransfer 400 fully paid shares in the Victorian Cornish Company, and an order for the dismissal of the counter-claim. As regards the costs, the defendant must pay the costs of the action, and, as I have already said, the costs of the counter-claim.

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I may add that in arriving at this conclusion I do so largely not upon the basis of any merits of the plaintiffs, but upon the demerits of the defendant.

'At the Common Law no man could be prohibited from working in any lawful trade, for the Law abhors idleness, the mother of all evil, otium omnium vitiorum mater, and especially in young men, who ought in their youth (which is their seed-time) to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age; and therefore the Common Law abhors monopolies, which prohibit any from working in any lawful trade; and that appears in 2 H. 5. 5*b*. A dyer was bound that he should not use the dyer's craft for two years, and there Hull held, that the bond was against the Common Law, and by God if the plaintiff was here, he should go to prison till he paid a fine to the King.'—*Per curiam* in the Case of the Tailors, &c., of Ipswich (12 Jac. 1) 11 Co. Rep. 53 b.

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Appeal from an order of the Court of Appeal ([1893] 1 Ch. 630). The question turned upon a covenant in restraint of trade, unrestricted as to space, made on the 12th of September 1888 between the appellant and the respondent company, under the circumstances related in the judgment of Lord Herschell L.C. The covenant was in these words:—

'The said Thorsten Nordenfelt shall not, during the term of twenty-five years from the date of the incorporation of the company if the company shall so long continue to carry on

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business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns gun-mountings or carriages, gunpowder explosives or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company, provided that such restriction shall not apply to explosives other than gunpowder or to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purposes of re-constitution or with a view to the transfer of the business thereof to another company so long as such other company taking a transfer thereof shall continue to carry on the same.'

The appellant having afterwards entered into an agreement with other manufacturers of guns and ammunition, the respondent company brought an action against him to enforce the covenant by injunction.

Romer J. made an order declaring that the covenant was void as being unreasonable and beyond what was required for the protection of the company.

The Court of Appeal (Lindley, Bowen and A. L. Smith L.JJ.) were of opinion that the covenant was too wide in its application to any business which the company might carry on during twenty-five years, but was valid as regarded the gun and ammunition business, and varied the order of Romer J. by declaring 'that the covenant is valid so far as it relates to the trade or business of a manufacturer of guns gun-mountings or carriages, gunpowder explosives or ammunition (except explosives other than gunpowder or subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper).' And the Court granted an injunction and ordered an inquiry accordingly ([1893] 1 Ch. 630).

LORD MACNAGHTEN.—My Lords, the appellant, Thorsten Nordenfelt, a Swedish gentleman of much intelligence, as his able address to your Lordships proved, and of great skill in certain branches of mechanical science, had established in England and Sweden a valuable business in connection with the

manufacture of quick-firing guns. His customers were comparatively few in number, but his trade was world-wide in extent. He had upon his books almost every monarch and almost every State of any note in the habitable globe. In 1886 Mr. Nordenfelt sold his business to a limited company which was formed for the purpose of purchasing it. At the same time and as part of the same transaction he entered into a restrictive covenant with the purchasers intended to protect the business in their hands. In 1888 the purchasers transferred their business to the respondents, a limited company established with the object of combining the Nordenfelt business with a similar business founded by a Mr. Maxim. The transfer was made with the concurrence of Mr. Nordenfelt. Without his concurrence and co-operation it is plain that it would not have been made at all. On the occasion of the transfer, and as part of the arrangement, Mr. Nordenfelt entered into a restrictive covenant with the respondents. This covenant was in some respects wider, in others less wide, than the covenant with the original purchasers. But it was in lieu of, and in substitution for, that covenant, which of course would have been kept alive if Mr. Nordenfelt had declined to come into the new arrangement.

In these circumstances I think that the Court of Appeal were right in regarding the covenant which Mr. Nordenfelt entered into with the respondents as a covenant made upon the occasion of the sale of his business, and as depending for its validity upon the principles and considerations applicable to such a case.

The stipulation was that Mr. Nordenfelt should not, during the term of twenty-five years from the date of the incorporation of the company, if the company should so long continue to carry on business, 'engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns, gun-mountings or carriages, gunpowder explosives or ammunition'—so far the covenant has been held good; then come the words, 'or in any business competing or liable to compete in any way with that for the time being carried on by the company.' A proviso was added to the effect that such restriction should not apply to explosives other than gunpowder, or to subaqueous or submarine boats or torpedoes, or castings or forgings of steel or iron, or alloys of iron or of copper. The

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latter part of the covenant, which extends to all competing businesses, may be disregarded. In view of the manifold objects of the company, as set out in their memorandum of association, it was held by the Court of Appeal to be void; and there is no appeal from that part of the decision. The proviso also, I think, may be put aside. It is one of the circumstances to be taken into consideration as bearing upon the question of the reasonableness of the agreement; but it is not, I think, essential to the validity of this covenant.

Mr. Nordenfelt admittedly has broken the earlier part of the covenant. His contention is that the whole covenant is void in law as being a covenant in restraint of trade unlimited in space. And the only point which your Lordships have to decide is whether that part of the covenant which the appellant has broken is valid. For it cannot be disputed that the covenant is severable, and that part may be good though part be void.

The learned judges of the Court of Appeal have come to the conclusion that the earlier part of the covenant is valid. But though they all arrive at one and the same result, they approach the question from somewhat different points of view.

Lindley L.J. expressed his opinion that the doctrine 'that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee' was 'the doctrine to which the modern authorities have been gradually approximating.' But he could not, he said, 'regard it as finally settled, nor, indeed, as quite correct.' He thought it ignored 'the law which forbids monopolies and prevents a person from unrestrictedly binding himself not to earn his living in the best way he can.' In the particular circumstances of the present case he considered that the earlier part of the covenant was not contrary to public policy. Apart from public policy, he thought it reasonable, not being wider than was 'reasonably necessary for the protection of the interests of the covenantee.'

The late Lord Bowen considered that it was the established common law doctrine,—a rule to be gathered from the books 'with perfect ease,' though certain equity judges had ignored the rule or misunderstood the law—that in the case of contracts

in general restraint of trade the Courts had nothing to do with the reasonableness of the transaction. That was an inquiry which appertained only to partial restraints. Contracts in general restraint of trade he defined as 'those by which a person restrains himself from all exercises of his trade in any part of England.' 'Scores of cases,' he added, 'have proceeded on this basis, and those who dispute the rule can only do so, as it seems to me, by disregarding the judgments and opinions of an uncounted number of unanimous common law judges.' But then he thought that the rule, being a rule based on reason and policy, might admit of exceptions; and treating the present case as an exception, he, too, thought the agreement limited to the first part of the covenant reasonable in itself and not contrary to public policy.

A. L. Smith L.J. came to the same conclusion, thinking that there was no hard-and-fast rule 'that every covenant in restraint of trade is ipso facto void if it is unlimited as to space,' and being apparently of opinion that the restraint in the present case, though unlimited in space, might yet be regarded as partial owing to the circumstance that certain trades, or branches of trade, in which the appellant had been engaged were reserved to him by the proviso attached to the covenant.

No doubt it is one thing to say that all exceptions to the general rule that the policy of the law is against restraints of trade are referable to one and the same principle, and that the only true test is, what is a reasonable restraint in the particular case. It is another thing to say that restraints of trade are divisible into two distinct categories—partial restraints and general restraints—that reasonableness is a test applicable to partial restraints and inapplicable to general restraints, but that the rule admits of exceptions; and that when you have found an exceptional case, you may apply to it the very same test which is applicable to partial restraints. There is a distinction certainly. But whether there is a substantial difference it is perhaps unnecessary to inquire. Assuming the rule to be that general restraints are void as being contrary to public policy, and not on any other ground, an exception must surely arise, if exceptions are admissible at all, as soon as you find that the particular case under consideration is not contrary to public

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policy, and so not opposed to the principle on which the rule is founded.

Thinking, as I do, that the distinction, if it exists, is of no practical importance, I should have been content with expressing my concurrence in the result at which the Court of Appeal have arrived, if it had not been for certain passages in the very able and elaborate judgment of the late Lord Bowen, from which I respectfully dissent.

Having laid down what he considers to be the common law rule, Lord Bowen proceeds to observe that 'the first cloud upon the clear sky of the common law narrative comes in the equity decision of Lord Langdale in *Whittaker* v. *Howe* ((1841) 3 Beav. 383, 394),'—a decision to which he applies the word 'inexplicable.' 'Everything,' says Lord Bowen, 'appears clear in the case except the judgment of the Court. The covenant was not a covenant in partial, but in general restraint of trade; and the restraint of trade being a general one, the Court had nothing to do with the reasonableness of the transaction; Lord Langdale, nevertheless, begins by stating that the question was whether the restraint intended to be imposed upon the defendant was reasonable; and he cites as a guide for himself the words of Tindal C.J. in *Horner* v. *Graves* (7 Bing. 735, 743).' Then, after pointing out that *Horner* v. *Graves* was a case of limited restraint, Lord Bowen adds, 'Lord Langdale thus appears to miss the whole point of the common law classification, and treats the matter before him in the wrong category.' Dealing with the judgment of James V.C. in the *Leather Cloth Company* v. *Lorsont* (Law. Rep. 9 Eq. 345), Lord Bowen says that his 'language seems calculated in several passages to confuse, and not to throw light upon our conceptions of the established common law doctrine.' 'The Vice-Chancellor's expressions,' he observes, 'are at times coloured by the same kind of misapprehension of the common law as that which pervades the judgment of Lord Langdale in *Whittaker* v. *Howe* (3 Beav. 383, 394).' Observations of a similar kind are made in reference to the judgment of Sir Edward Fry in *Rousillon* v. *Rousillon* (14 Ch. D. 351).

My Lords, this appears to me to be a very grave censure—graver, I think, than Lord Bowen could have supposed or

intended—because in such cases it was undoubtedly the duty of equity to follow the common law. The province of the Court was to give effect to common law rights. If the covenant was void at common law, a Court of Equity would have erred grievously in attempting to enforce it by injunction. If the question had been doubtful, it would have been the duty of the Court, at least in the time of Lord Langdale, to leave the parties to their common law rights, or to take the opinion of a Court of Common Law, as was done in the case of *Bunn* v. *Guy* (4 East, 190), and by Lord Langdale himself in the case of *Nicholls* v. *Stretton* (7 Beav. 42 ; 10 Q. B. 346).

Criticism so unsparing seems to invite or provoke inquiry. One cannot do otherwise than test the ground at each step. I have read, I think, every reported case upon the subject, and I must say, with the utmost deference to Lord Bowen's opinion, that I cannot help thinking that Lord Langdale and James V.C. and Sir E. Fry have rightly apprehended the common law doctrine as it may be traced in the books, and as it is expounded by some of the leading authorities on the subject in modern times.

In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and therefore void (*Colgate* v. *Bacheler* (Cro. Eliz. 872)). In time, however, it was found that a rule so rigid and far-reaching must seriously interfere with transactions of every-day occurrence. Traders could hardly venture to let their shops out of their own hands ; the purchaser of a business was at the mercy of the seller ; every apprentice was a possible rival. So the rule was relaxed. It was relaxed as far as the exigencies of trade for the time being required, gradually and not without difficulty, until it came to be recognised that all partial restraints might be good, though it was thought that general restraints, that is, restraints of general application extending throughout the kingdom, must be bad. Why was the relaxation supposed to be thus limited ? Simply because nobody imagined in those days that a general restraint could be reasonable, not because there was any inherent or essential distinction between the two cases. ' Where the restraint is general,' says Lord Macclesfield, in *Mitchel* v. *Reynolds* (1 P. Wms. 181), ' not to exercise a trade throughout the kingdom,' the restraint ' must be void, being of

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no benefit to either party and only oppressive, as shall be shewn by-and-by.' Later on he gives his reason. 'What does it signify,' he says, 'to a tradesman in London what another does at Newcastle; and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other.' 'Any deed,' says Best L.C.J., in *Homer* v. *Ashford* (3 Bing. at p. 326), 'by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom, would be void, because no good reason can be imagined for any person's imposing such a restraint on himself.'

The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities. But it is not to be supposed that that result was reached all at once. The law has changed much, even since *Mitchel* v. *Reynolds* (1 P. Wms. 181). It has become simpler and broader too. It was laid down in *Mitchel* v. *Reynolds* (1 P. Wms. 181) that the Court was to see that the restriction was made upon a good and adequate consideration, so as to be a proper and useful contract. But in time it was found that the parties themselves were better judges of that matter than the Court, and it was held to be sufficient if there was a legal consideration of value; though of course the quantum of consideration may enter into the question of the reasonableness of the contract. For a long time exceptions were very limited. As late as 1793 it was argued that a restriction which included a country town, and extended ten miles round it, was so wide as to be unreasonable. It was

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said, and apparently said with truth, that up to that time restrictions had been confined to the limits of a parish, or to some short distance, as half-a-mile. But Lord Kenyon, in his judgment, observed that he did not see that the limits in question were necessarily unreasonable. 'Nor do I know,' he added, 'how to draw the line': *Davis* v. *Mason* (5 T. R. 118). The doctrine that the area of restriction should correspond with the area within which protection is required is an old doctrine. But it used to be laid down that the correspondence must be exact, and that it was incumbent on the plaintiff to shew that the restriction sought to be enforced was neither excessive nor contrary to public policy. Now the better opinion is that the Court ought not to hold the contract void unless the defendant 'made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion or that the public interest would be sacrificed' if the proposed restraint were upheld: *Tallis* v. *Tallis* (1 E. & B. 391, 412).

To a certain extent, different considerations must apply in cases of apprenticeship and cases of that sort, on the one hand, and cases of the sale of a business or dissolution of partnership on the other. A man is bound an apprentice because he wishes to learn a trade and to practise it. A man may sell because he is getting too old for the strain and worry of business, or because he wishes for some other reason to retire from business altogether. Then there is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment.

When the question is how far interference with the liberty of an individual in a particular trade offends against the interest of the public, there is not much difficulty in measuring the offence and coming to a judgment on the question. The difficulty is much greater when the question of public policy is considered at large and without direct reference to the interests of the individual under restraint. It is a principle of law and of public policy that trading should be encouraged and that trade should be free; but a fetter is placed on trade and trading is discouraged if a man who has built up a valuable business is not to be permitted to dispose of the fruits of his labours to the best advantage. It has been said that if the restraint be general 'the whole of

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the public is restrained'—a phrase not, I think, particularly accurate, or perhaps particularly intelligible. It has been said that when a person is debarred from carrying on his trade within a certain limit of space he will carry it on elsewhere, and thus the public outside the area of restriction will gain an advantage which may be set off, as it were, against the disadvantage resulting to the public within the limited area. That is, perhaps, a just observation in a case of apprenticeship and cases of that sort; but it is, I think, rather a fanciful way of looking at the matter in the case of a sale of goodwill. Applied to that sort of case, it seems to me to be just one of those unrealities which tend to confuse this question. What has the public to hope in the way of future service from a man who sells his business meaning to trade no more? Is it likely that he will begin the struggle of life again working at his old trade or profession in some remote place where he has no interest and no connections? Is the possibility that he may do so a factor to be taken into consideration? Now, when all trades and businesses are open to everybody alike, it is not very easy to appreciate the injury to the public resulting from the withdrawal of one individual. When Lord Kenyon was pressed with an argument as to the injury to the public in Thetford that would result from denying them the services of a particular surgeon, he answered that the public were not likely to be injured by an agreement of this kind. 'Every other person,' he added, 'is at liberty to practise as a surgeon in this town': *Davis* v. *Mason* (5 T. R. 118). Then I cannot help thinking that there is a good deal of common sense in the way in which Lord Campbell looked at this question. A retired partner in the canvassing trade of a publishing business, being under a restrictive covenant, claimed the right to disseminate his publications within the area of restriction. He appealed to public policy. 'It is clear,' said Lord Campbell, 'there would be evil if the law justified such a breach of contract; but it is by no means clear there would be any compensating good to the public from the publications intended by the defendant to be so made in violation of his promise to the plaintiff': *Tallis* v. *Tallis* (1 E. & B. 391, 413). That, of course, is not decisive in itself. It is an element for consideration of more or less weight according to circumstances. But Lord Campbell's observation

serves to bring into contrast the two principles which have to be adjusted in all these cases—freedom of trade and freedom of contract.

Sir Edward Fry's view was that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable. Lord Bowen cites this passage, and meets it with the following question: 'Is it not a truer view that the Courts have never, as a rule, even entered on the consideration of the circumstances of any particular case where the prohibition has been unlimited as to area?' That question seems to go to the root of the matter. May I venture to put it to the proof? Since the date of *Mitchel* v. *Reynolds* (1 P. Wms. 181) how many cases have there been in which a general prohibition has come before a Court of Common Law for discussion or decision? So far as I can discover there are two, and two only—*Ward* v. *Byrne* (5 M. & W. 548) and *Hinde* v. *Gray* (1 Man. & G. 195). In *Hinde* v. *Gray* (1 Man. & G. 195) the point was disposed of during the argument, on the presiding judge observing that the particular covenant under consideration had been held invalid in *Ward* v. *Byrne* (5 M. & W. 548). That observation was repeated in the judgment, and nothing more was said. The covenant in question there was as little reasonable, though perhaps not quite so absurd, as the covenant in *Ward* v. *Byrne* (5 M. & W. 548). *Hinde* v. *Gray* (1 Man. & G. 195), therefore, does not help one much. There remains the case of *Ward* v. *Byrne* (5 M. & W. 548). In that case an unlimited restraint was imposed on a coal merchant's clerk. When once he left his master's employment he was not for nine months to earn his daily bread anywhere as a coal merchant or a coal merchant's clerk, or in any capacity connected with the business of a coal merchant—an absurd and unreasonable stipulation, if ever there was one. The only wonder is, that when the case first came before the Court on an argument as to the construction of the covenant, the vice of the contract passed unnoticed. Afterwards there was a motion in arrest of judgment on the ground that the covenant was void. How was that application dealt with? Did the Court abstain from entering on the consideration of the particular circumstances? Why, the main, if not the only, ground of objection was the unreasonableness of such a restriction in the particular circumstances of

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the case. 'This restriction,' observes the Chief Baron, 'extends to all parts of England, and to every species of engagement by which this person during that time could gain a livelihood by his trade. What protection could the plaintiff require to such an extent as this? Can it be supposed that the plaintiff's trade could be prejudiced by this man's entering into the service of a coal merchant in Scotland? The obligation which the defendant undertakes by his bond is that he shall neither be nor serve a coal merchant in any capacity for nine months. *That goes so far beyond what the plaintiff could require that it is an unreasonable restriction*: it is void on both grounds. It is against the principles and policy of the law as to any restraints on trade and the right of every man to be at liberty to struggle for his own existence in the exercise of any lawful employment; and it is beyond what is necessary for the protection of the plaintiff or what the justice of the case demands.' Nothing can be plainer than the view of the Chief Baron: all restraints of trade, if there is nothing more, are regarded with disfavour by the law; this restraint is unnecessary and unreasonable. The judgment of Parke B. is, I think, substantially to the same effect; but it is so important that I shall reserve it for separate consideration presently. Gurney B. followed the same line of argument. 'What is there,' he asks, 'in the trade of a coal merchant in London whose interests could be injured by any person setting up as a coal merchant or assisting another person in that trade at Exeter or York?' All these considerations, it will be observed, were wholly beside the point if there was in force a simple rule to the effect that the Court has nothing whatever to do with the reasonableness of the transaction in the case of general restraints.

There is no higher authority upon this subject in modern times than Tindal C.J. He had more to do with moulding the law on this head and bringing it into harmony with common sense than all the judges since Lord Macclesfield's time put together. You will hardly find any judgment in reference to restraint of trade delivered by any Court in England or America during the last sixty years in which some passage is not cited from some judgment of Tindal C.J. In *Horner* v. *Graves* (7 Bing. 735) Tindal C.J. delivered the considered judgment of the Court. In the course of it he had occasion to refer to the passage in

Mitchel v. *Reynolds* (1 P. Wms. 181), which is supposed to be the origin, or at least the earliest embodiment of the doctrine, that a different principle applies to general restraints and partial restraints. 'Parker C.J.,' he observes, 'says a "restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good"; which are rather instances and examples than limits of the application of the rule, *which can only be at last, what is a reasonable restraint with reference to the particular case.*' It is quite true that *Horner* v. *Graves* (7 Bing. 735) was a case of partial restraint; but here we have Tindal C.J. dealing with the case of a general restraint as well as the case of a partial restraint. With both cases pointedly before him, and in reference to the one as well as to the other, he says that the only rule is, what is a reasonable restraint with reference to the particular case. I do not find that this passage has ever been questioned, nor is there in the books, so far as I can discover, any authority conflicting with it, except the judgment of Lord Bowen in the present case. It may, perhaps, be objected that passages are to be found in the judgments of Tindal C.J. as well as in the judgments of other judges, in which it is said that general restraints are void without adverting to any reason for their invalidity. That, no doubt, is so, and, indeed, in this very judgment there is such a passage. But is it not fair to conclude that Tindal C.J. thought general restraints bad, not because there was an arbitrary law to that effect—a hard-and-fast rule which judges had learned by rote, and the origin of which it was forbidden to explore—but because he took a general restraint to be an example, a typical example if you will, of an unreasonable contract? It does not seem to me to affect the question in the very least how often the dictum may be found repeated, if, on the one hand, it is not accompanied by any reason or explanation, and, on the other, it appears without any authoritative statement that the proposition had become a rule which was neither to be questioned nor explained. It is merely a dictum after all, because there is no reported case, except, perhaps, *Ward* v. *Byrne* (5 M. & W. 548), in which it could have had any bearing upon the decision. Certainly it is no wonder that judges of former times did not foresee that the discoveries of science and the practical results of those discoveries

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might in time prove general restraints in some cases to be perfectly reasonable. When that time came it was only a legitimate development—it was hardly even an extension—of the principle on which exceptions were first allowed to admit unlimited restraints into the class of allowable exceptions to the general rule.

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I would now turn to the judgment of Parke B. in the case of *Ward* v. *Byrne* (5 M. & W. 548), which was decided in 1839, eight years after the decision in *Horner* v. *Graves* (7 Bing. 735). The learned judge begins by stating the circumstances of the case, and the leading principle laid down in *Mitchel* v. *Reynolds* (1 P. Wms. 181), that the public have an interest in every person carrying on his trade freely. Then he cites as a guide for himself the words of Tindal C.J., in a case of limited restraint, the very thing for which Lord Langdale is so much blamed. He could not, he said, express the rule more clearly than it had been done by Tindal C.J. in *Hitchcock* v. *Coker* (6 A. & E. 438), where he says: 'We agree in the general principle adopted by the Court of Queen's Bench, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void.' Oddly enough, that is a reproduction of the very passage which Lord Langdale selected as his guide; only he took it from *Horner* v. *Graves* (7 Bing. 735) directly; Parke B. took it from the judgment on appeal in *Hitchcock* v. *Coker* (6 A. & E. 438). There it is attributed to Lord Denman, who does no more than quote the passage which Lord Langdale cites from *Horner* v. *Graves* (7 Bing. 735). Then Parke B. observes, and he repeats the observation more than once, that there is no authority in favour of the position that there can be a general restriction limited only as to time. He might, I think, have said with equal truth, that there was no case since *Mitchel* v. *Reynolds* (1 P. Wms. 181) in which the question had come before the Court for consideration. In conclusion he says: 'This case falls within *the rule laid down by Tindal C.J., viz., that this is a general prohibition from carrying on trade which is more extensive than the interests of the party with whom the contract is made can possibly require.* On that ground I think the judgment ought to be arrested.' What did Parke B.

mean there by the rule laid down by Tindal C.J. ? There is no rule to be found laid down by Tindal C.J. in those words or to that effect except in the passage I have cited from *Horner* v. *Graves* (7 Bing. 735). Parke B. may have been referring to *Horner* v. *Graves* (7 Bing. 735), or he may have been referring to some opinion well known to him, though it is not to be found in any reported judgment. In either case that would be a strong confirmation of the argument I am endeavouring to present to your Lordships. But the argument seems to me to be irresistible if Parke B. thought that the rule as he expressed it, and as applied to a case of general prohibition, was fairly to be deduced from a similar rule laid down in a case of partial restraint.

With regard to Lord Langdale's judgment in *Whittaker* v. *Howe* (3 Beav. 383), I have some difficulty in understanding what the objection to it is, even on the view which Lord Bowen takes in reference to partial and general restraints, unless his view was, as one passage in his judgment which has already been cited seems to indicate, that a restraint limited to England is to be considered as a general restraint nowadays when England is only part of the United Kingdom as much as it was when the three kingdoms were separate.

I cannot think that *Whittaker* v. *Howe* (3 Beav. 383) requires much explanation. There is a homely proverb current in my part of the country which says you may not 'sell the cow and sup the milk.' That is just what Mr. Howe tried to do. He was a solicitor in large practice. He sold his business for a good round sum to two younger practitioners, and covenanted not to practise on his own account in England or Scotland. In order to hold the business together his name was kept in the firm and he remained in the office, drawing a handsome salary. Then there was a quarrel; and he carried off surreptitiously all the papers he could lay his hands on; he set up in the immediate neighbourhood; and he tried to steal the business he had sold. His defence was that a covenant so wide was against public policy. But it did not occur to him to return the price: that he kept in his pocket. Lord Langdale thought the public would not greatly suffer if Mr. Howe withdrew for a time from the ranks of an honourable profession. I cannot think he was very wrong. It seems almost absurd to talk of public policy in connection

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with such a case. It is a public scandal when the law is forced to uphold a dishonest act: would the public find suitable compensation in the privilege of employing an unprincipled lawyer practising in violation of his solemn engagement? And it must be borne in mind that the firm remained, though one member retired into private life. Lord Langdale held, on the evidence before him, that the restraint was not unreasonable, although it extended to the whole of England and Scotland. Whether he was right or wrong in that view it is impossible to say without knowing what the evidence was. Undoubtedly some solicitors have correspondents in almost every business centre in the kingdom. At any rate, that particular point does not seem to have been contested in the argument, and it lay on the defendant to prove the area of restriction unreasonable. I venture to think that the decision in *Whittaker* v. *Howe* (3 Beav. 383) was right. And, further, whether the restraint in that case ought to be regarded as general or as partial, I think the decision was in accord with the opinions of Tindal C.J. and Parke B. Nor can I, with all deference to Patteson J., understand how anybody could suppose that *Whittaker* v. *Howe* (3 Beav. 383), in which the restraint was held to be reasonable, conflicts with *Ward* v. *Byrne* (5 M. & W. 548), where the restraint was plainly unreasonable and held to be so.

Now, in the present case it was hardly disputed that the restraint was reasonable, having regard to the interests of the parties at the time when the transaction was entered into. It enabled Mr. Nordenfelt to obtain the full value of what he had to sell; without it the purchasers could not have been protected in the possession of what they wished to buy. Was it reasonable in the interests of the public? It can hardly be injurious to the public, that is, the British public, to prevent a person from carrying on a trade in weapons of war abroad. But apart from that special feature in the present case, how can the public be injured by the transfer of a business from one hand to another? If a business is profitable there will be no lack of persons ready to carry it on. In this particular case the purchasers brought in fresh capital, and had at least the opportunity of retaining Mr. Nordenfelt's services. But then it was said there is another way in which the public may be injured. Mr. Nordenfelt has

'committed industrial suicide,' and as he can no longer earn his living at the trade which he has made peculiarly his own, he may be brought to want and become a burden to the public. My Lords, this seems to me to be very far-fetched. Mr. Nordenfelt received over £200,000 for what he sold. He may have got rid of the money. I do not know how that is. But even so, I would answer the argument in the words of Tindal C.J.: 'If the contract is a reasonable one at the time it is entered into we are not bound to look out for improbable and extravagant contingencies in order to make it void': *Rannie* v. *Irvine* (7 Man. & G. at p. 976).

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My Lords, for the reasons I have given, I think the only true test in all cases, whether of partial or general restraint, is the test proposed by Tindal C.J.: What is a reasonable restraint with reference to the particular case? I think that the restraint in the present case is reasonable in every point of view, and therefore I agree that the appeal should be dismissed.

LORD HERSCHELL, L.C., LORDS WATSON, ASHBOURNE, and MORRIS agreed.

Order appealed from affirmed and appeal dismissed.

'The exceptions to the rule that an employee shall not be prevented from earning his living as best he can include the right of an employer to protect his trade secrets and prevent his old customers from being wrongfully enticed away from him, but protection from competition is not among those exceptions.'—Per Astbury, J., in *Hepworth Manufacturing Co.* v. *Ryott* [1920] 1 Ch. at p. 12.

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HERBERT MORRIS LIMITED *v.* SAXELBY [1916] 1 A. C. 688

Appeal from an order of the Court of Appeal affirming a judgment of Sargant J. ([1915] 2 Ch. 57).

The appellants were the plaintiffs and the respondent was the defendant in an action to enforce a covenant in restraint of trade, and the sole question at issue was as to the enforceability of the covenant.

The appellants carried on the business of engineers, their special

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and main line of business being the manufacture and sale of lifting machinery, particularly pulley blocks, runways, and travelling cranes, for which they had acquired a great reputation. Their head office and works were at Loughborough, and they had branch offices in London, Manchester, Birmingham, Glasgow, Cardiff, Leeds, Newcastle, and Sheffield. They had no branch office, but employed a traveller in Ireland. They were the largest makers of lifting machinery in the United Kingdom. The appellants had devoted much time and money to collecting and tabulating information of various kinds for use in their business. In particular they got out and arranged a large number of charts called E charts, which gave details of their manufacture and particulars of the strengths of the materials employed, and contained a large amount of technical information as the result of experiments made by the appellants and their employees. They also had drawings called L sheets, comprising tables and curves indicating the strength and composition of the materials required for any particular job. All these documents were treated as confidential, and though they were handed out from time to time to the appellants' employees, stringent precautions were taken to ensure their return.

The respondent on leaving school entered into the employment of the appellants in February, 1901, as a junior draughtsman, being then aged fifteen. In 1906 he became leading draughtsman in the department of pulley blocks, hand overhead travelling cranes, and hand overhead runways. In 1908 he was appointed resident engineer at the appellants' Cardiff branch, and in 1909 he became their manager and resident engineer in London. In 1910 he was sent back to Loughborough, where he took charge of departments connected with the sale of pulley blocks and with Admiralty contracts. On March 17, 1911, he entered into an agreement with the appellants whereby he was to be employed from February 7, 1911, as an engineer for two years certain, and thereafter subject to four weeks' notice on either side, at a salary of 3*l.* 17*s.* 6*d.* per week. And the agreement contained the following clauses :—

'6. The employee shall not during his employment nor at any time afterwards divulge nor communicate to any person corporation or firm any information which he may receive or

obtain in relation to the company's affairs and customers and all instructions drawings notes and memoranda made by the employee or which may come into his possession while engaged as aforesaid shall be the exclusive property of the company.

'7. In consideration of the agreement hereinbefore contained the employee covenants and agrees with the company their successors and assigns that he will not at any time during a period of seven years from the date of his ceasing to be employed by the company whether under this agreement or otherwise howsoever either in the United Kingdom of Great Britain or Ireland carry on either as principal agent servant or otherwise alone or jointly or in connection with any other person firm or company or be concerned or assist directly or indirectly whether for reward or otherwise in the sale or manufacture of pulley blocks hand overhead runways electric overhead runways hand overhead travelling cranes or any part thereof or be concerned or assist as aforesaid in any business connected with such sale or manufacture.'

These clauses were substantially a repetition of clauses contained in an agreement of July 16, 1906, which the respondent was required by the appellants to sign immediately on his attaining the age of twenty-one, when he was employed as leading draughtsman, except that the clause restricting the respondent from carrying on trade in competition with the appellants did not include in the prohibited articles electric overhead runways.

The respondent left the appellants' service on April 19, 1913. During the last six months of his service he attempted to obtain employment in various engineering firms which did not compete with the appellants, but having failed in these efforts, in May, 1913, he entered into the employment of Messrs. Derome, who carried on the business of engineers and manufacturers of lifting machinery at Bavay in France. On February 28, 1914, he left Messrs. Derome and entered into the employment of Vaughan & Sons, Limited, of Manchester, who were manufacturers of lifting machinery and competitors in trade of the appellants.

Thereupon the appellants commenced this action against the respondent claiming injunctions restraining him from committing breaches of clauses 6 and 7 of the agreement of March 17, 1911. At the trial, however, the appellants abandoned their claim under clause 6, and they did not claim to enforce the last

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words of clause 7 ' or any part thereof or be concerned as aforesaid in any business connected with such sale or manufacture.'

Sargant J. dismissed the action. The learned judge said that from the point of view of the employers alone he was not prepared to hold that the covenant was unreasonable as regards either time or space, having regard to the very special character of the work, and if the question were one between a vendor and purchaser he would feel compelled to give effect to it ; but he held that it was unreasonable to the defendant and prejudicial to the public and was therefore not enforceable. This decision was affirmed by the Court of Appeal by a majority (Lord Cozens-Hardy M.R. and Joyce J., Phillimore L.J. dissenting).

LORD PARKER OF WADDINGTON.[1]—My Lords, in the case of *Nordenfelt* v. *Maxim Nordenfelt Co.* ([1894] A. C. 535) Lord Macnaghten considered most if not all of the prior cases relating to contracts in restraint of trade and came to certain conclusions. I had to consider them in the case of *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* ([1913] A. C. 781), and I adhere to everything I then said. As I read Lord Macnaghten's judgment, he was of opinion that all restraints on trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course, rest on the party alleging them. When once they are proved, it is a question of law for the decision of the judge whether they do or do not justify the restraint. There is no question of onus one way or another.

It will be observed that in Lord Macnaghten's opinion two conditions must be fulfilled if the restraint is to be held valid. First, it must be reasonable in the interests of the contracting parties, and, secondly, it must be reasonable in the interests of the public. In the case of each condition he lays down a test of reasonableness. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in

[1] Read by Lord Sumner.

whose favour it is imposed; to be reasonable in the interests of the public it must be in no way injurious to the public.

With regard to the former test, I think it clear that what is meant is that for a restraint to be reasonable in the interests of the parties it must afford *no more than* adequate protection to the party in whose favour it is imposed. So conceived the test appears to me to be valid both as regards the covenantor and covenantee, for though in one sense no doubt it is contrary to the interests of the covenantor to subject himself to any restraint, still it may be for his advantage to be able so to subject himself in cases where, if he could not do so, he would lose other advantages, such as the possibility of obtaining the best terms on the sale of an existing business or the possibility of obtaining employment or training under competent employers. As long as the restraint to which he subjects himself is no wider than is required for the adequate protection of the person in whose favour it is created, it is in his interest to be able to bind himself for the sake of the indirect advantages he may obtain by so doing. It was at one time thought that, in order to ascertain whether a restraint were reasonable in the interests of the covenantor, the Court ought to weigh the advantages accruing to the covenantor under the contract against the disadvantages imposed upon him by the restraint, but any such process has long since been rejected as impracticable. The Court no longer considers the adequacy of the consideration in any particular case. If it be reasonable that a covenantee should, for his own protection, ask for a restraint, it is in my opinion equally reasonable that the covenantor should be able to subject himself to this restraint. The test of reasonableness is the same in both cases.

It was suggested in argument that the interests of the public ought to be considered and weighed in determining whether a restraint is reasonable in the interests of the parties. I dissent from this view. It would, indeed, entirely destroy the value of Lord Macnaghten's tests of reasonableness. The first question in every case is whether the restraint is reasonable in the interests of the parties. If it is not, the restraint is bad. If it is, it may still be shown that it is injurious to the public, though, as I pointed out in the case referred to, the onus of so showing would lie on the party alleging it.

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My Lords, it appears to me that Lord Macnaghten's statement of the law requires amplification in another respect. If the restraint is to secure no more than 'adequate protection' to the party in whose favour it is imposed, it becomes necessary to consider in each particular case what it is for which and what it is against which protection is required. Otherwise it would be impossible to pass any opinion on the adequacy of the protection.

In the *Nordenfelt Case* ([1894] A. C. 535) that which it was required to protect was the goodwill of a business transferred by the covenantor to the covenantee, and that against which protection was sought was competition by the covenantor throughout the area in which such business was carried on. Under the particular circumstances of the case a world-wide covenant against competition was held no more than adequate for the purchaser's protection. It was argued before your Lordships that no distinction can be drawn between the position of the purchaser of the goodwill of a business taking such a covenant from his vendor and the case of the owner of a business taking such a covenant from his servant or apprentice. In both cases it was said that the property to be protected was the same and the dangers to be guarded against the same. I am of opinion that this argument cannot be accepted. The distinction between the two cases is, I think, quite clear, and is recognized both by Lord Macnaghten and Lord Herschell in the *Nordenfelt Case* ([1894] A. C. 535). The goodwill of a business is immune from the danger of the owner exercising his personal knowledge and skill to its detriment, and if the purchaser is to take over such goodwill with all its advantages it must, in his hands, remain similarly immune. Without, therefore, a covenant on the part of the vendor against competition, a purchaser would not get what he is contracting to buy, nor could the vendor give what he is intending to sell. The covenant against competition is, therefore, reasonable if confined to the area within which it would in all probability enure to the injury of the purchaser.

It is quite different in the case of an employer taking such a covenant from his employee or apprentice. The goodwill of his business is, under the conditions in which we live, necessarily subject to the competition of all persons (including the servant or apprentice) who choose to engage in a similar trade. The employer

in such a case is not endeavouring to protect what he has, but to gain a special advantage which he could not otherwise secure. I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the Court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained.

As might be expected, where the cases are so numerous, it is not impossible to find dicta pointing to a contrary conclusion. I refer in especial to what was said by Parke B. in *Mallan* v. *May* (11 M. & W. 653), but even here it is to be observed that counsel in argument supported the validity of the covenant, on the ground that it was no more than was necessary to prevent the defendant from availing himself of the knowledge he had acquired in the plaintiff's service to interfere with the plaintiff's customers. If a covenant restraining competition by an employee were in itself reasonable, it is difficult to see why the Court has considered in almost every case whether such covenant could be justified as no more than sufficient to protect trade connection and trade secrets.

The point did not arise for actual decision until *Sir W. C. Leng & Co.* v. *Andrews* ([1909] 1 Ch. 763). In that case the covenantor was a newspaper reporter. He did not in the course of his employment come across the covenantee's customers, nor was he entrusted by his employers with any confidential information whatever. The effect of the covenant, therefore, was merely to prevent him using his personal skill and knowledge within the limited area mentioned in the covenant; in other words, it was merely to preclude competition. In these circumstances it was unanimously held that the covenant was bad.

In *Mason* v. *Provident Clothing and Supply Co.* ([1913] A. C. 724) it was argued, apparently for the first time in this class of case, that an employer might reasonably say 'I will not have

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the skill and knowledge acquired in my employment imparted to my trade rivals,' and that the validity of the restraint did not depend upon personal contact with the employer's customers, but upon the fact that the employee gained that general knowledge which put him into a position to compete with his master and made him a source of danger, against which the master was entitled to protect himself.

This argument was rejected by your Lordships' House, and the restraint in question was held bad, as being wider than was necessary to protect the employer from injury by misuse of the employee's acquaintance with customers or knowledge of trade secrets. In fact the reason, and the only reason, for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary. Such a restraint has, so far as I know, never been upheld, if directed only to the prevention of competition or against the use of the personal skill and knowledge acquired by the employee in his employer's business.

My Lords, it remains to apply what I have said to the particular circumstances of the present case. Mr. Herbert Morris, the managing director of the plaintiff company, very candidly admitted that the real object of the plaintiff company in imposing the restraint was to preclude competition on the part of the defendant after he had left the company's employment. The company objected, he said, to skill and knowledge acquired in its service being put at the disposition of any trade rival, and the skill and knowledge he referred to was the general skill and knowledge which an employee of any ability must necessarily obtain as opposed to knowledge of any matter and skill in any process in which the company could be said to have any property at all. To use Lord Shaw's metaphor in *Mason* v. *Provident Clothing and Supply Co.* ([1913] A. C. 724), it was 'subjective' as opposed to 'objective' skill and knowledge; or, to use the expression of Joyce J. in this case, it was skill and knowledge 'which were his own,' and in no sense the plaintiff's property. As directed against competition or against the use of this skill and knowledge, I am clearly of opinion that the restraint was in no way required for

the plaintiffs' protection, and therefore unreasonable and bad in law.

An attempt was, however, made in argument to justify the restraint on the ground that it was no more than adequate for the protection of the plaintiffs' trade connection and trade secrets. I am of opinion that this attempt completely failed. With regard to the plaintiffs' connection, there is little or no evidence that the defendant ever came into personal contact with the plaintiffs' customers. For a period, it is true, he was manager of the London branch of the plaintiffs' business, and for another period sales manager at Loughborough. With the exception of these periods he was employed entirely in the engineering department. Had the restraint been confined to London and Loughborough and a reasonable area round each of these centres, it might possibly have been supported as reasonably necessary to protect the plaintiff's connection, but a restraint extending over the United Kingdom was obviously too wide in this respect.

With regard to trade secrets, I am not satisfied that the defendant was entrusted with any trade secret in the proper sense of the word at all. Mr. Walter boldly argued that the expression trade secrets ought to be extended so as to include everything which Mr. Morris claimed to be peculiar to the plaintiff's method of carrying on their business.

I will assume that the matters referred to by Mr. Walter are in fact peculiar to the plaintiffs' business, though I can hardly regard Mr. Morris's uncorroborated evidence as very satisfactory proof that the practices in question were unknown to other firms. Still, the manner in which Sargant J. dealt with this part of the case appears to me to be unanswerable. Though the defendant had access to the E charts, the L sheets, the drawings of special machines, the costs index, and other documents, all of which may be considered confidential, these documents were far too detailed for the defendant to carry away the contents thereof in his head. All that he could carry away was the general method and character of the scheme of organization practised by the plaintiff company. Such scheme and method can hardly be regarded as a trade secret. The same applies to the plaintiff company's system of standardizing mechanical apparatus capable of being used in more than one class of machine. The nearest approach that I can

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find in the evidence to anything in the nature of a trade secret is the mention of certain formulae, said to be based on the plaintiffs' experience, and to be more trustworthy than Molesworth's formulae for similar purposes.

During the course of the argument your Lordships asked for but failed to obtain these formulae, and therefore I am unable to judge whether they are such that the defendant could carry them in his memory. I therefore cannot attach any great importance to them. It would be a point of some difficulty whether the possession by an employee of a single trade secret would justify a restraint as wide as that in the present case, but under the circumstances I do not consider that this point really arises.

In my opinion the case falls within your Lordships' decision in *Mason* v. *Provident Clothing and Supply Co.* ([1913] A. C. 724). The appeal therefore fails.

LORDS ATKINSON, SUMNER, and SHAW agreed.

'Every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, "You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract." The rule upon this subject is well expressed in a recent English treatise. "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." Pollock on Contracts (4th ed.) 425.'—Per Gray, J., in *Arkansas Smelting Co.* v. *Belden Co.* (1887) 127 U. S. at p. 387.

'The case of *British Waggon Co.* v. *Lea* decided two points: (1) That voluntary liquidation did not in itself incapacitate the company from performing its contract. The Court left open the question as to the position of the parties if and when the company was dissolved. (2) That the company fulfilled its obligations under the contract by finding a new company (assignee of the contract) able and willing to execute the repairs which the old company contracted to perform. That decision in the year 1880 has never, so far as I am aware, been questioned in a Court of law.'—Per Cozens-Hardy, L.J., in *Tolhurst* v. *Associated Portland Cement Manufacturers* [1902] 2 K. B. at p. 679.

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THE judgment of the Court (COCKBURN, C.J., and MANISTY, J.) was delivered by

COCKBURN, C.J.—This was an action brought by the plaintiffs to recover rent for the hire of certain railway waggons, alleged to be payable by the defendants to the plaintiffs, or one of them, under the following circumstances:—

By an agreement in writing of the 10th of February, 1874, the Parkgate Waggon Company let to the defendants, who are coal merchants, fifty railway waggons for a term of seven years, at a yearly rent of 600*l.* a year, payable by equal quarterly payments. By a second agreement of the 13th of June, 1874, the company in like manner let to the defendants fifty other

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waggons, at a yearly rent of 625*l.*, payable quarterly like the former.

Each of these agreements contained the following clause: 'The owners, their executors, or administrators, will at all times during the said term, except as herein provided, keep the said waggons in good and substantial repair and working order, and, on receiving notice from the tenant of any want of repairs, and the number or numbers of the waggons requiring to be repaired, and the place or places where it or they then is or are, will, with all reasonable despatch, cause the same to be repaired and put into good working order.'

On the 24th of October, 1874, the Parkgate Company passed a resolution, under the 129th section of the Companies Act, 1862, for the voluntary winding up of the company. Liquidators were appointed, and by an order of the Chancery Division of the High Court of Justice, it was ordered that the winding-up of the company should be continued under the supervision of the Court.

By an indenture of the 1st of April, 1878, the Parkgate Company assigned and transferred, and the liquidators confirmed to the British Company and their assigns, among other things, all sums of money, whether payable by way of rent, hire, interest, penalty, or damage, then due, or thereafter to become due, to the Parkgate Company, by virtue of the two contracts with the defendants, together with the benefit of the two contracts, and all the interest of the Parkgate Company and the said liquidators therein; the British Company, on the other hand, covenanting with the Parkgate Company 'to observe and perform such of the stipulations, conditions, provisions, and agreements contained in the said contracts as, according to the terms thereof were stipulated to be observed and performed by the Parkgate Company.' On the execution of this assignment the British Company took over from the Parkgate Company the repairing stations, which had previously been used by the Parkgate Company for the repair of the waggons let to the defendants, and also the staff of workmen employed by the latter company in executing such repairs. It is expressly found that the British Company have ever since been ready and willing to execute, and have, with all due diligence, executed all necessary repairs to the said waggons. This, however, they have done under a special agreement come to

between the parties since the present dispute has arisen, without prejudice to their respective rights.

In this state of things the defendants asserted their right to treat the contract as at an end, on the ground that the Parkgate Company had incapacitated themselves from performing the contract, first, by going into voluntary liquidation, secondly, by assigning the contracts, and giving up the repairing stations to the British Company, between whom and the defendants there was no privity of contract, and whose services, in substitution for those to be performed by the Parkgate Company under the contract, they the defendants were not bound to accept. The Parkgate Company not acquiescing in this view, it was agreed that the facts should be stated in a special case for the opinion of this Court, the use of the waggons by the defendants being in the meanwhile continued at a rate agreed on between the parties, without prejudice to either, with reference to their respective rights.

The first ground taken by the defendants is in our opinion altogether untenable in the present state of things, whatever it may be when the affairs of the company shall have been wound up, and the company itself shall have been dissolved under the 111th section of the Act. Pending the winding-up, the company is by the effect of ss. 95 and 131 kept alive, the liquidator having power to carry on the business, 'so far as may be necessary for the beneficial winding-up of the company,' which the continued letting of these waggons, and the receipt of the rent payable in respect of them, would, we presume, be.

What would be the position of the parties on the dissolution of the company it is unnecessary for the present purpose to consider.

The main contention on the part of the defendants, however, was that, as the Parkgate Company had, by assigning the contracts, and by making over their repairing stations to the British Company, incapacitated themselves to fulfil their obligation to keep the waggons in repair, that company had no right, as between themselves and the defendants, to substitute a third party to do the work they had engaged to perform, nor were the defendants bound to accept the party so substituted as the one to whom they were to look for performance of the contract; the contract was therefore at an end.

The authority principally relied on in support of this contention

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was the case of *Robson* v. *Drummond* (2 B. & Ad. 303), approved of by this Court in *Humble* v. *Hunter* (12 Q. B. 310). In *Robson* v. *Drummond* (2 B. & Ad. 303) a carriage having been hired by the defendant of one Sharp, a coachmaker, for five years, at a yearly rent, payable in advance each year, the carriage to be kept in repair and painted once a year by the maker—Robson being then a partner in the business, but unknown to the defendant—on Sharp retiring from the business after three years had expired, and making over all interest in the business and property in the goods to Robson, it was held, that the defendant could not be sued on the contract—by Lord Tenterden on the ground that 'the defendant might have been induced to enter into the contract by reason of the personal confidence which he reposed in Sharp, and therefore might have agreed to pay money in advance, for which reason the defendant had a right to object to its being performed by any other person;' and by Littledale and Parke, JJ., on the additional ground that the defendant had a right to the personal services of Sharp, and to the benefit of his judgment and taste, to the end of the contract.

In like manner, where goods are ordered of a particular manufacturer, another, who has succeeded to his business, cannot execute the order, so as to bind the customer, who has not been made aware of the transfer of the business, to accept the goods. The latter is entitled to refuse to deal with any other than the manufacturer whose goods he intended to buy. For this *Boulton* v. *Jones* (2 H. & N. 564) is a sufficient authority. The case of *Robson* v. *Drummond* (2 B. & Ad. 303) comes nearer to the present case, but is, we think, distinguishable from it. We entirely concur in the principle on which the decision in *Robson* v. *Drummond* (2 B. & Ad. 303) rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may

be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which, consequently, cannot in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that in stipulating for the repair of these waggons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company, or by any one with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in this stipulation was that the waggons should be kept in repair; it was indifferent to them by whom the repairs should be done. Thus if, without going into liquidation, or assigning these contracts, the company had entered into a contract with any competent party to do the repairs, and so had procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the waggons in repair. While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that, in applying the principle, the Court of Queen's Bench in *Robson* v. *Drummond* (2 B. & Ad. 303) went to the utmost length to which it can be carried, as it is difficult to see how in repairing a carriage when necessary, or painting it once a year, preference would be given to one coachmaker over another. Much work is contracted for, which it is known can only be executed by means of subcontracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by some one on his behalf. In all these cases the maxim Qui facit per alium facit per se applies.

In the view we take of the case, therefore, the repair of the waggons, undertaken and done by the British Company under their contract with the Parkgate Company, is a sufficient performance by the latter of their engagement to repair under their contract with the defendants. Consequently, so long as the Parkgate Company continues to exist, and, through the British Company, continues to fulfil its obligation to keep the waggons in repair, the defendants cannot, in our opinion, be heard to say that

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the former company is not entitled to the performance of the contract by them, on the ground that the company have incapacitated themselves from performing their obligations under it, or that, by transferring the performance thereof to others, they have absolved the defendants from further performance on their part.

That a debt accruing due under a contract can, since the passing of the Judicature Acts, be assigned at law as well as equity, cannot since the decision in *Brice* v. *Bannister* (3 Q. B. D. 569) be disputed.

We are therefore of opinion that our judgment must be for the plaintiffs for the amount claimed.

The following passage from the judgment of Collins, M.R., in *Tolhurst* v. *Associated Portland Cement Manufacturers* [1902] 2 K. B. at p. 668 is valuable for its exposition of the different senses in which the phrase 'assignment of contract' is commonly used:—

'It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to some one else; this can only be brought about by the consent of all three, and involves the release of the original debtor: see *Liversidge* v. *Broadbent* ((1859) 4 H. & N. 603), and cases collected in the notes to *Lampleigh* v. *Brathwait* (1 Sm. L. C. 10th ed. p. 136). On the other hand, it is equally clear that the benefit of a contract can be assigned, and wherever the consideration has been executed and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned, and can be put in suit by the assignee in his own name after notice. Whether the right so created involves privity between the debtor and the assignee is, I think, doubtful; and the rule of the common law that the action must be brought in the name of the assignor shews that it did not regard such a transaction as equivalent to a novatio. The right seems rather to be based on the equitable principle that it would be against conscience on the part of the person on whom the obligation lay to discharge it to the original contractee after he had notice that the latter had assigned the benefit of it to another person. The special right of ignoring altogether the consent of the person upon whom the obligation lies to the substitution of one person for another as the recipient of the benefit would seem in principle and in common justice to be confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it, and I think the right of dropping the original contractee out of the discussion must be limited to those cases only in which the contract—that is, the benefit of all that remains to be done under it—has been assigned; and it is in this sense only, as it seems to me, that contracts can be said in strictness to be assignable. There is, however,

another class of contracts, where there are mutual obligations still to be enforced and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all in the sense of discharging the original contractee and creating privity or quasi privity with a substituted person. "You have a right," says Lord Denman C.J., in a passage cited by Gray J. in delivering the judgment of the Supreme Court of the United States in the case of *Arkansas Smelting Co.* v. *Belden Co.* (127 U. S. 379, 387), "to the benefit you contemplate from the character, credit, and substance of the party with whom you contract:" *Humble* v. *Hunter* ((1848) 12 Q. B. 310, at p. 317). To suits on these contracts, therefore, the original contractee must be a party, whatever his rights as between him and his assignee. He cannot enforce the contract without shewing ability on his part to perform the conditions performable by him under the contract. This is the reason why contracts involving special personal qualifications in the contractor are said, perhaps somewhat loosely, not to be assignable. What is meant is, not that contracts involving obligations not special and personal can be assigned in the full sense of shifting the burden of the obligation on to a substituted contractor any more than where it is special and personal, but that in the first case the assignor may rely upon the act of another as performance by himself, whereas in the second case he cannot. He cannot vouch the capacity of another to perform that which the other party to the contract might, however unreasonably, insist was what alone he undertook to pay for—namely, work to be executed by the party himself. If, for instance, he had ordered a painting from some unknown artist of his own choice, he could not be compelled to accept instead of it the work of another artist, however eminent.' [Edd.]

'A document given "by way of charge" is not one which absolutely transfers the property with a condition for re-conveyance, but is a document which only gives a right to payment out of a particular fund or particular property, without transferring that fund or property.'—Per Denman, J., in *Tancred* v. *Delagoa Bay and East Africa Railway Co.* (1889) 23 Q. B. D. at p. 242.

'DURHAM BROTHERS *v.* ROBERTSON [1898] 1 Q. B. 765

Appeal from the judgment of Wills J. at the trial of the action without a jury.

The defendant entered into a building contract on April 1, 1895, with contractors, Smith & Co., under which it was stipulated that the contractors should build certain houses which were to be leased to them at a ground-rent of 150*l*. One of the clauses of the

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contract gave the contractors the option of paying an additional ground-rent of 60*l.* in consideration of which they were to receive from the defendant a sum of 1080*l.* On August 19 of the same year the contractors wrote to the plaintiffs in the following terms: '*Re* Building Contract of Middle Class Dwellings situate on the west side South Lambeth Road.—In consideration of money advanced from time to time we hereby charge the sum of 1080*l.*, being the agreed price for the sale of 60*l.* per annum ground-rent which will become due to us from John Robertson, Esq., of No. 73, Rosendale Road, West Dulwich, on the completion of the above buildings as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you.' The plaintiffs gave notice of the assignment to the defendant, the John Robertson named therein, and this action was brought against him to recover the amount which it was alleged had, in the events that happened, become due. The defence was a denial that the amount ever became payable to the contractors under their building contract, and, secondly, that there was no valid assignment of the sum within s. 25, sub-s. 6, of the Judicature Act, 1873.

The learned judge gave judgment for the plaintiffs on both points.

The defendant appealed.

CHITTY, L.J. read the following judgment:—

This is an appeal by the defendant Robertson against a judgment whereby the plaintiffs Durham Brothers recovered judgment for a sum of 1080*l.* The action was tried by Wills J. without a jury. The plaintiffs' claim was that under a building contract dated April 1, 1895, made between the defendant, the building owner, and Smith & Co., the contractors, the sum of 1080*l.* became payable, in the events which had happened, on August 18, 1896, as a premium or purchase-money for an improved or additional ground-rent of 60*l.*; that this sum before it became payable had been duly assigned by Smith & Co. to the plaintiffs by writing within the meaning of the Judicature Act, 1873, s. 25, sub-s. 6, and that due notice of the assignment had been given to the defendant. There was no question about the notice. The defences relied upon on the appeal were in substance, first, a denial

that the sum of 1080*l.* ever became payable under the building contract; and, secondly, that there was no valid assignment of that sum within the Act. Smith & Co. were not parties to the action, nor was George Tapley Smith, to whom a lease, at the improved ground-rent, was in fact granted on August 18, 1896. Wills J. decided both points in favour of the plaintiffs.

Both points were raised on the appeal. The second point as to the assignment was first argued. Mr. Jelf, for the respondents, admitted (and rightly) that if the decision on this point was adverse to his clients the appeal must succeed. But, on consideration, it appeared to us that a decision on this point alone would be unsatisfactory, because it would leave the other point still open to controversy in some further litigation between the parties. Consequently, the argument on the other point was resumed and concluded; and we now proceed to give judgment on both the questions.

I will follow the course of the argument, and deal first with the point as to the assignment; and I shall assume throughout this part of the judgment that the sum of 1080*l.* did become payable under the building contract of April 1, 1895.

The document, relied on by the plaintiffs as an assignment within the Act, is a letter dated August 19, 1895, written by Smith & Co. to the plaintiffs. It runs thus: '*Re* Building Contract of Middle Class Dwellings, situate on the west side South Lambeth Road, S.W.—In consideration of money advanced from time to time we hereby charge the sum of 1080*l.*, being the agreed price for the sale of 60*l.* per annum ground-rent which will become due to us from John Robertson, Esq., of No. 73, Rosendale Road, West Dulwich, on the completion of the above buildings as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you.'

Now the document divides itself into two parts. First, there is a charge upon 1080*l.* for the advances; and, secondly, there is an assignment of the interest of Smith & Co. in the 1080*l.* in terms not absolute, but until the happening of an event, namely, the repayment of the advances with interest. On repayment of the advances and interest the assignment, according to the import of the document, comes to an end.

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Dealing with the case apart from the Judicature Act, there is here unquestionably a valid equitable assignment. To operate as an equitable assignment no particular form of words is required in the document: an engagement or direction to pay, out of a debt or fund, a sum of money constitutes an equitable assignment, though it does not operate as an assignment of the whole fund or debt. A mere charge on a fund or debt operates as a partial equitable assignment. As is well known, an ordinary debt or chose in action before the Judicature Act was not assignable so as to pass the right of action at law, but it was assignable so as to pass the right to sue in equity. In his suit in equity [1] the assignee of a debt, even where the assignment was absolute on the face of it, had to make his assignor, the original creditor, party in order primarily to bind him and prevent his suing at law, and also to allow him to dispute the assignment if he thought fit. This was a fortiori the case where the assignment was by way of security, or by way of charge only, because the assignor had a right to redeem. Further, the assignee could not give a valid discharge for the debt to the original debtor unless expressly empowered so to do. The original debtor, whether he admitted the debt or not, was not concerned with the state of the accounts between the assignor and the assignee where the debt was assigned by way of security; and the rule was that where he did not dispute the debt he should have his costs of suit out of the debt: he was regarded in the light of a stakeholder. It is unnecessary to cite authorities in support of any of the above propositions.

Now it was in order to afford some remedy for this state of the law that sub-s. 6 was passed. It is plain on reading it that it does not apply to every case of equitable assignment of a debt or chose in action.

Two matters, as is apparent on the face of it, had to be regarded: first, the simplifying the remedy in favour of the assignee; and, secondly, the protection of the original debtor.

With these preliminary observations, which I have made for the purpose of explaining the language of the sub-section, which at first sight seems peculiar if not awkward, I proceed to examine the sub-section itself: 'Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of

[1] See note at end of this case.

charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.' This is followed by a proviso that if the debtor (I omit the other words) shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the claimants to interplead, or he may pay the debt into court under the Trustee Relief Act.

No argument was addressed to us founded on this proviso. It appeared, from the evidence put in at the trial, that under an agreement in August, 1896, connected with the original building contract, George Tapley Smith (not a member of the contractors' firm) had or might have a claim to the 1080*l.* in question in this action, or to a sum of like amount; and we were informed by counsel during the argument on the appeal, that he had issued a writ against the defendant Robertson to recover that sum. But the defendant has taken no step in this action calling on the parties to interplead, supposing that he had a right so to do, which he had not, as he disputed the debt. In these circumstances no question arises on the proviso, and it may be left out of consideration.

To bring a case within the sub-section transferring the legal right to sue for the debt and empowering the assignee to give a good discharge for the debt, there must be (in the language of the sub-section) an absolute assignment not purporting to be by way of charge only. It is requisite that the assignment should be, or at all events purport to be, absolute, but it will not suffice if the assignment purport to be by way of charge only. It is plain that every equitable assignment in the wide sense of the term as used in equity is not within the enactment.

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As the enactment requires that the assignment should be absolute, the question arose whether a mortgage, in the proper sense of the term, and as now generally understood, was within the enactment. In *Tancred* v. *Delagoa Bay and East Africa Railway* (23 Q. B. D. 239) there was an assignment of the debt to secure advances with a proviso for redemption and reassignment upon repayment. It was there held by the Divisional Court (disapproving of a decision in *National Provincial Bank* v. *Harle* ((1881) 6 Q B. D. 626), that such a mortgage fell within the enactment. It appears to me that the decision of the Divisional Court was quite right. The assignment of the debt was absolute: it purported to pass the entire interest of the assignor in the debt to the mortgagee, and it was not an assignment purporting to be by way of charge only. The mortgagor-assignor had a right to redeem, and on repayment of the advances a right to have the assigned debt reassigned to him. Notice of the reassignment pursuant to the sub-section would be given to the original debtor, and he would thus know with certainty in whom the legal right to sue him was vested. I think that the principle of the decision ought not to be confined to the case where there is an express provision for reassignment. Where there is an absolute assignment of the debt, but by way of security, equity would imply a right to a reassignment on redemption, and the sub-section would apply to the case of such an absolute assignment. In a well-known judgment of the Exchequer Chamber in *Halliday* v. *Holgate* ((1868) L. R. 3 Ex. 299), the late Willes J., in delivering the judgment of the Court, distinguished between lien, pledge, and mortgage, and spoke of a mortgage as passing the property out and out. A mortgage is not mentioned in the enactment; but where there is an absolute assignment of the debt, the limiting words as to a charge only are not sufficient to exclude a mortgage. The respondent's counsel cited a passage from Fisher on Mortgages and from Wharton's Dictionary to the effect that a mortgage was a conditional conveyance. In bygone days mortgages were made by a conveyance subject to a condition making it void if the money was repaid within six months; but mortgages in this form had become obsolete long before the Judicature Act, 1873, was passed. The form was abandoned because of the difficulty in ascertaining in whom the legal estate was vested, the title being

made to depend on the fact whether the money was or was not paid within the time limited by the condition.

The assignment before us complies with all the terms of the enactment save one, which is essential: it is not an absolute but a conditional assignment. The commonest and most familiar instance of a conditional assurance is an assurance until J. S. shall return from Rome. The repayment of the money advanced is an uncertain event, and makes the assignment conditional. Where the Act applies it does not leave the original debtor in uncertainty as to the person to whom the legal right is transferred; it does not involve him in any question as to the state of the accounts between the mortgagor and the mortgagee. The legal right is transferred, and is vested in the assignee. There is no machinery provided by the Act for the reverter of the legal right to the assignor dependent on the performance of a condition; the only method within the provisions of the Act for revesting in the assignor the legal right is by a retransfer to the assignor followed by a notice in writing to the debtor, as in the case of the first transfer of the right. The question is not one of mere technicality or of form: it is one of substance, relating to the protection of the original debtor and placing him in an assured position.

It is necessary to refer to *Brice* v. *Bannister* (3 Q. B. D. 569). In that case there was an assignment of 100*l.* out of money due or to become due to the assignor under a contract to build a ship, with an express power to give a good discharge to the debtor. Lord Coleridge C.J. held that the assignment was within the 25th section. The Court of Appeal decided the case quite apart from the Act. Cotton L.J. expressly decided the case on the ground of equitable assignment. That is shewn by the opening sentence of his judgment, where he says that the letter was a good equitable assignment. Bramwell L.J. reluctantly assented to this view. Brett L.J. dissented, but on general principles. So soon as it was ascertained that there was a good equitable assignment with power to give a discharge, it became unnecessary to consider whether it fell within the Act or not. In *Ex parte Nichols* ((1883) 22 Ch. D. 782, at p. 787) the present Master of the Rolls, referring to this decision, treated the assignment as an equitable assignment. He said that the decision was founded on the principle that the

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right of an equitable assignment of a debt cannot be defeated by a voluntary payment by the debtor to the assignor. The decision of Lord Coleridge C.J. in *Brice* v. *Bannister* (3 Q. B. D. 569), that the case fell within the 25th section, appears to me to be open to question. The assignment purported to be by way of charge only. It was a direction to pay the 100*l.* out of money due or to become due. No doubt it purported to be a charge of an unredeemable sum of 100*l.*; but still it was a charge. The section speaks of an absolute assignment of any debt or other chose in action. It does not say 'or any part of a debt or chose in action.' It appears to me as at present advised to be questionable whether an assignment of part of an entire debt is within the enactment. If it be, it would seem to leave it in the power of the original creditor to split up the single legal cause of action for the debt into as many separate legal causes of action as he might think fit. However, it is not necessary to decide the point in the present case, and I leave it open for future consideration.

The result then, thus far, is this: the plaintiffs' assignment is not within the Act, and they had no legal right to sue for it. The assignment, however, is a valid equitable assignment, but by way of security only, and without power to give a valid discharge to the debtor. No relief can be given to the plaintiffs in this action as it is constituted. It is admitted as between the parties to this action that considerably less than 1080*l.* is due to the plaintiffs in respect of their advances. In the absence of Smith & Co. the amount due from them to the plaintiffs cannot be ascertained. An account taken in this action of the advances would not bind Smith & Co. Nor could the matters in question, on the footing that the plaintiffs have a mere equitable assignment, be finally determined in the absence of George Tapley Smith, who has or seems to have had an adverse claim to the 1080*l.* under the documents of August 18, 1896. Mr. Jelf was unquestionably right when he admitted that the plaintiffs' case failed unless it came within the 25th section. The trial has taken place, and it is not possible now to make any amendment by adding parties or otherwise.

[The Lord Justice then dealt with the question whether the 1080*l.* had become payable, and confirmed the view taken by the learned judge at the trial, and continued :—]

The result is that the plaintiffs fail in the action. The appeal must be allowed, and judgment entered for the defendant.

A. L. SMITH and COLLINS, L.JJ. agreed.

Appeal allowed.

In his remarks on the remedy of an equitable assignee (*ante*, p. 332) the Lord Justice must not be understood to suggest that before the passing of the Judicature Act the ordinary course for the assignee of a mere debt was to bring a suit in equity. Usually his proper course was to bring an action at law in the name of the assignor as plaintiff; see *Roxburghe* v. *Cox* (1881) 17 Ch. D. at p. 526, per James, L.J. If the assignor, after tender of a proper indemnity against costs, refused to allow the action to be brought in his name, the assignee might apply to a court of equity, and that court would decree that he should be at liberty, on giving a proper indemnity, to use the assignor's name in an action at law; see *Crouch* v. *Credit Foncier of England* (1873) L. R. 8 Q. B. at p. 380, per Blackburn, J.; *Torkington* v. *Magee* [1902] 2 K. B. at p. 432, per Channell, J. It would also appear that at any rate in the later practice, the necessity of resorting to a court of equity for this purpose had disappeared, and that an assignee might get an order from a Common Law Judge in Chambers directing the assignor to allow his name to be used; see the statement of the practice by counsel in *Hammond* v. *Messenger* (1838) 9 Sim. at p. 331. Alternatively, if the assignor would not allow the matter to be tried at law in his name, a court of equity had itself jurisdiction to compel the debtor to pay the debt to the assignee, especially where the assignor was acting in collusion with the debtor; see *Hammond* v. *Messenger*, per Shadwell, V.C., at p. 332. In such a suit the assignee had to make the assignor a party for the reasons given by Chitty, L.J.; for as the assignment was not recognized in a Court of Law, the recovery by the assignee in equity would have afforded the debtor no answer to an action at law by the assignor, who still retained the legal right to sue and might have exercised it to the prejudice of the debtor; in which case the debtor's only course would have been to file another bill in equity against the assignor for the purpose of restraining his proceedings at law. The presence of the assignor in the assignee's suit rendered this circuitous process unnecessary for the protection of the debtor. The assignor's presence before the court, however, was necessary only when the assignment was of a debt or other chose in action recoverable at law; the assignee of an equitable interest in the nature of a chose in action might maintain a suit in equity for the assertion of that interest without bringing his assignor before the Court, because in such a case there was no claim which the assignor could assert by an action at law: see Daniell, *Chancery Practice* (1871, 5th ed., p. 185). The modern practice where an assignment of a debt or similar chose in action does not conform to the conditions of the Judicature Act (i.e. is

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not a *legal* assignment enabling the assignee to bring an action in his own name without making the assignor a party, but is an assignment good in equity only), is for the assignee to join the assignor as a co-plaintiff if the latter consents, or as a defendant if he does not. Recent cases even show a tendency to dispense with the assignor's presence in the action altogether, where his joinder would be a mere formality and not necessary for the proper protection of the debtor: see *Tolhurst* v. *Associated Portland Cement Manufacturers* [1903] A. C. 414, per Lord Macnaghten, at p. 420, and per Lord Lindley, at p. 424; *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* [1905] A. C. 454, per Lord Macnaghten, at p. 462. [Edd.]

STUBBS v. THE HOLYWELL RAILWAY COMPANY.

'Generally speaking, contracts bind the executor or administrator, though not named. Where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent and master and servant, the death of either party puts an end to the relation; and, in respect of service after the death, the contract is dissolved, unless there be a stipulation express or implied to the contrary. It is obvious that, in this case, if the servant had died, his master could not have compelled his representatives to perform the service in his stead, or pay damages, and equally by the death of the master the servant is discharged of his service, not in breach of the contract, but by implied condition.'—Per Willes, J., in *Farrow* v. *Wilson* (1869) L. R. 4 C. P. at p. 746.

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Declaration for money payable by the defendants to the plaintiff as administrator of William Stubbs, deceased, for work done by the said William Stubbs, in his lifetime for the defendants, at their request, and fees, &c., payable in respect thereof, for money paid by the said William Stubbs in his lifetime for the defendants, at their request, and for money due on accounts stated between the said William Stubbs in his lifetime and the defendants, and for money due on accounts stated between the plaintiff as administrator and the defendants.

Pleas. Never indebted, and payment. Issue thereon.

The cause was tried before Mellor, J., at the last Liverpool spring assizes, when the following facts were proved:—

In December, 1865, William Stubbs, the deceased, was appointed consulting engineer by the defendants, to complete the construction

of certain works on their line. The work was to be completed in fifteen months from the 5th December, and the defendants were to pay Stubbs 500*l.* as his fee or salary for performing it, by five equal quarterly instalments. He was also to be paid his travelling expenses. The work was commenced on these terms, and the first quarterly payment of 100*l.* was made in March, 1866. Stubbs continued in his employment for two quarters more. Soon after the end of the third quarter, and before any payment beyond the 100*l.* had been made to him, he died intestate. Less than three-fifths of the whole work had been done, but no default on the part of the deceased was proved. The plaintiff, his administrator, now sought to recover two instalments of 100*l.* each for the second and third quarters' work, and also 10*l.* for travelling expenses incurred by the deceased. The defendants contended, however, that they were only liable on a quantum meruit for the amount of work actually done during the second and third quarters. The jury found the actual value of the work done to be 150*l.* A verdict was entered for the plaintiff for 210*l.*, being the full amount claimed, viz. 200*l.* for the two quarterly instalments, and 10*l.* for travelling expenses. Leave was reserved to the defendants to reduce the damages to 160*l.*, on the ground that the death of Mr. Stubbs dissolved the contract, and that the contract being dissolved, the plaintiff was only entitled to recover on a quantum meruit for the work actually done.

[A rule nisi was obtained accordingly.]

MARTIN, B.—The law on the subject is clear and free from doubt. Suppose a man enters into a contract to do a certain piece of work for a certain sum, then if he die before he completes it, he can recover nothing, not even if before his death he had done nine-tenths of it. For the contract was for the whole work, and not for nine-tenths of it. But suppose that the contract is for the performance of a certain piece of work for a certain sum, to be paid at the rate, say of 50*l.* a month, then the person employed earns 50*l.* at the end of each successive month. It is true that if, after doing a portion of the work, he refused to do the rest, he might not be able to recover, because he could not prove that he was ready and willing to perform his part of the contract. But such a case as the present has no analogy with

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that of a refusal by the person employed to continue performance. The contract, no doubt, is ended by the death of Stubbs, but only in this sense, that the act of God has made further performance impossible. The man's life was an implied condition of the contract, but the fact of his death can have nothing whatever to do with the payment due for what has been done—with what has been actually earned by the deceased. The contract had, it is true, an implied condition that he should live for fifteen months. But his death does not throw back his representative upon the right of recovering on a quantum meruit only. He can recover the stipulated price, due to the deceased when he died, of the work the deceased had actually executed. No vested right of action is taken away by death. The contract is at an end, but it is not 'rescinded,' for rescission is the act of two parties, not of one. With regard to the remarks quoted from Smith's Leading Cases, I may say, with the greatest respect for the learned author, that some of the positions laid down by him in the note to *Cutter* v. *Powell*, in his leading cases, 6th ed. vol. ii. p. 1, are not, in my opinion, fully supported by the authorities.

KELLY, C. B., and CHANNELL, B., delivered judgments to the same effect.

Rule discharged.

'It may be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it pro tempore, then it is entitled to the name of a *negotiable instrument*, and the property in it passes to a bonâ fide transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, i.e. if it be either not accustomably transferable, or, though it be accustomably transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it pro tempore, it is not a *negotiable instrument*, nor will delivery of it pass the property of it to a vendee, however bonâ fide, if the transferor himself have not a good title to it, and the transfer be made out of market overt.'—Cited from 1 Smith L. C., at p. 259, 2nd ed., per Blackburn, J., in *Crouch* v. *Credit Foncier of England* (1873) L. R. 8 Q. B. at p. 381.

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LORD HERSCHELL.—My Lords, the litigation in this case has arisen out of the frauds of Mr. Delmar, a partner in the firm of Herapath, Delmar & Co., stockbrokers. The case of the plaintiff, the respondent in this appeal, is that Delmar having in his possession, for safe custody merely, certain securities of the plaintiff, known as Cedulas, fraudulently deposited them with the defendants by way of pledge for an advance, and that the defendants are consequently not entitled to detain them. The defendants deny that the securities pledged with them were the property of the plaintiff, and insist that even assuming this to have been the case, they have acquired a good title as against him.

The facts may be shortly stated :—

In the month of October 1887, Herapath, Delmar & Co. had in their possession the bonds of $15,000 Cedulas belonging to the plaintiff. On the 12th of October Delmar on behalf of his firm entered into a contract with Messrs. Prior & Williams, jobbers on the Stock Exchange, to sell them $15,000 of Cedulas for the settling-day of the 14th of October. He at the same time contracted with Messrs. Prior & Williams to purchase of them like bonds of the same amount for the account of the 28th of

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October, the price of these latter bonds being the same for which the former were sold, with interest at the rate of 6 per cent. for fourteen days added. On the 14th of October, in pursuance of the contract of sale, Delmar's firm delivered to Prior & Williams, or their nominees, the bonds of the plaintiff. On the 28th of October, in pursuance of the simultaneous contract of purchase, Herapath, Delmar & Co. received from Greenwell & Co., a firm of brokers whose name appeared on the clearing-ticket given by Prior & Williams, Cedula bonds of the same description and to the same amount as those which had belonged to the plaintiff.

The defendants, the appellant banking company, had for many years been in the habit of making advances to the firm of Herapath, Delmar & Co. and their predecessors in business, receiving as security for such advances stocks, shares, and bonds. The securities deposited were frequently changed, such changes generally taking place at or about the time of the fortnightly settlements on the London Stock Exchange. On the 28th of October 1887 the said firm obtained from the bank a temporary advance of £6500, in addition to the then current loan; and in addition to the securities which the bank then held for the moneys already advanced, and which by the terms of their security they were entitled to hold for any additional advances, Herapath, Delmar & Co. deposited with the bank the Cedula bonds which they had obtained from Greenwell & Co. on that day. The bonds were obtained from Greenwell & Co. in exchange for a cheque on the appellants, and without the advance of the £6500 the firm would not have had at the appellants' bank sufficient funds to meet the cheque in favour of Greenwell & Co. and the other cheques drawn by the firm on that day.

Delmar afterwards absconded and his firm suspended payment. The bonds having been sold by the bank, the plaintiff on discovering what had been done brought an action against the bank alleging that Delmar had pledged the bonds without his authority and claiming (inter alia) a declaration as to the title and payment in respect of the bonds sold. The action was tried before Kekewich J. who made an order declaring that the bonds were the property of the plaintiff and were sold by the defendants without his authority, and ordering the defendants to pay to him £1703 8*s.* 3*d.*, the proceeds of the sale with interest. This

order was affirmed by the Court of Appeal (Lindley, Bowen, and Fry L.JJ.) ([1891] 1 Ch. 270).

I do not propose to enter upon the inquiry whether the plaintiff can establish a title to the bonds deposited with the bank, for in the view which I take of the case it is unnecessary to do so. I shall assume, for the purpose of my opinion, that these bonds were the property of the plaintiff.

The first question which arises, and to my mind a cardinal one, is, are these bonds negotiable instruments ?

The general rule of the law is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can shew that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shewn, a good title is acquired by personal estoppel against the true owner. There is an exception to the general rule, however, in the case of negotiable instruments. Any person in possession of these may convey a good title to them, even when he is acting in fraud of the true owner, and although such owner has done nothing tending to mislead the person taking them. I shall have to advert hereafter to the conditions which are requisite in order to render the title of one who takes a negotiable instrument valid as against the true owner ; but I dwell for the moment on the distinction to which I have called attention, because it is obvious that the facts to be proved by any one seeking to retain property he has obtained as against the person in fraud of whom it has been delivered to him, will differ essentially according as that property is or is not a negotiable instrument.

At the trial of the action evidence was given on behalf of the bank that Cedula bonds are commonly dealt with on the Stock Exchange. On the question being put, ' Are they dealt with as negotiable securities ? ' the learned judge interfered with the observation, ' There is no dispute about that,' on which the learned counsel for the plaintiff said, ' I do not want to make that admission.' The question was then put, and answered

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in the affirmative. There was no cross-examination by the plaintiff's counsel directed to this point; nor was any testimony adduced to the contrary. Having regard to the evidence thus given, to the nature of the bonds, and to the decision of this House in the case of *Goodwin* v. *Robarts* (1 App. Cas. 476), I can entertain no doubt that these Cedula bonds are negotiable instruments within the purview of that decision.

The question, then, which presents itself is, whether the appellants who are in possession of negotiable instruments which were delivered to them, I will assume, in fraud of the plaintiff, the true owner, can make good their title to them? That they became holders for value is not disputed; nor is it disputed that they took with full honesty of purpose. The allegation in the statement of claim is as follows:—'The bank knew, and had notice, not only from the general course of business hereinbefore referred to, but from the particular transactions between them and the plaintiff's brokers, that the securities deposited with them by the plaintiff's brokers were the securities of the customers of such brokers, and in the belief that the brokers who brought them had made sufficient advances on them to justify them in obtaining the amounts which they from time to time obtained from the bank, and relying on the integrity of the brokers, the defendant's bank from time to time made and continued advances to the brokers on such securities as the brokers from time to time deposited with them.' Applying this allegation to the transaction under consideration, it would be impossible to conceive a more unequivocal admission that the appellants acted in complete good faith in taking the bonds in question. But the statement of claim goes on to allege that the bank 'made no specific inquiries as to the ownership of the said securities, or the authority (if any) which the brokers had to deposit the same, or the interest (if any) which the brokers had therein by reason of advances on such securities, or otherwise.' It is upon this allegation that the bank had notice that Delmar held these bonds in the capacity of an agent that reliance is placed. I defer entering upon the inquiry whether it has been proved that the bank had either notice or knowledge that Delmar's title to the bonds was that of an agent only. Assuming for the moment that this was proved, what is its effect? It is contended on behalf of the respondent, as I under-

stand, that it put the bank upon inquiry as to the title of the person with whom they dealt, and as to the authority which he possessed ; and that having made no such inquiry, they obtained as against his principal no better title than he had. It was admitted that any one buying from Delmar would have obtained an unimpeachable title, notwithstanding his knowledge that Delmar was a broker, and that the bonds were the property of his principal. What ground is there for the position that in regard to a pledge the case is different, that one may safely take a negotiable instrument by way of sale from an agent without inquiry, but cannot so take it by way of pledge ? It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title, or the extent of his authority. The Factors Act (6 Geo. 4, c. 94), which gives validity to sales and pledges by persons entrusted with the documents of title to goods, contained a proviso, ' that the purchaser or pledgee had not notice by the documents, or otherwise, that the seller or pledgor was not the actual and bonâ fide owner of the goods sold or pledged—a proviso which, especially after the decision in *Fletcher* v. *Heath* (7 B. & C. 517), rendered it unsafe to make advances on goods or documents to persons known to have possession thereof as agents only ' (per Blackburn J. in *Cole* v. *North-Western Bank* (Law Rep. 10 C. P. at p. 367)). Accordingly the legislature intervened, and altered the law by the 5 & 6 Vict. c. 39. The recital is noteworthy, that ' advances on the security of goods and merchandise have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto.' Under this Act a document of title to goods may safely be taken by way of pledge from one known to be an agent without any inquiry as to his authority. It would be strange, indeed, if a negotiable instrument might not as safely be taken. Advances on the security of negotiable instruments are as usual and ordinary a course of business as advances on the security of goods and merchandise, and it is surely just as ' expedient and necessary that reasonable and safe facilities should be afforded thereto.' It was truly said that it was due to

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the Act of the legislature that documents of title to goods may safely be taken by way of pledge from an agent, and that there had been no such legislation in relation to negotiable instruments. But why not? The answer, to my mind, is plain—because it never was supposed to be necessary in order to give validity to such a transaction in the case of negotiable instruments. It is admitted that, in the case of a sale, legislation was not requisite; that the fact that the instruments were negotiable sufficed; why not, then, in the case of a pledge? If the contention of the respondent is to prevail, a negotiable instrument will be less negotiable than a bill of lading or a dock warrant—a strange conclusion, surely. The truth is, in my opinion, that what the Factors Acts have done is to attach some of the elements of negotiability to documents of title to goods, to render the mere possession of them evidence of authority to deal with them in the ordinary course of business, and to preclude the necessity of any further inquiry.

I proceed now to consider what the authorities shew to be the conditions necessary to give a good title to a person taking a negotiable instrument from one who had, as against the true owners, no authority to transfer it. In *Foster* v. *Pearson* (1 C. M. & R. at p. 855) Parke B. said: '"The rule of law was long considered as being firmly established that the holder of bills of exchange indorsed in blank or other negotiable securities transferable by delivery could give a title which he himself did not possess to a bonâ fide holder for value; and it may well be questioned whether it has been wisely departed from in the case to which reference has been made, and other subsequent cases in which care and caution in the taker of such securities has been treated as essential to the validity of his title besides and independently of honesty of purpose.' Now it will be observed that the learned judge considered two conditions only to be well established as essential to confer a good title upon the holder of a negotiable instrument, viz., that he should have taken it bonâ fide and for value. The other condition which he mentions, that due care and caution should have been exercised by the taker of the securities, he refers to as a departure from 'a rule of law long considered as being firmly established,' and he deprecates its introduction. The law has now for some time been settled on

this point in accordance with the view indicated by Parke B. In the *Bank of Bengal* v. *Fagan* (7 Moore P. C. 72) Lord Brougham said: 'It may be taken as established that whatever may have been the law laid down in *Gill* v. *Cubitt* (3 B. & C. 466) and *Down* v. *Halling* (4 B. & C. 330), and one or two other cases, and not abandoned, at least as far as language went which the Court used in subsequent cases, is now law no longer, and that the negligence of the party taking a negotiable instrument does not fix him with the defective title of the party passing it to him.' This passage was quoted by Willes J. in delivering his judgment in *Raphael* v. *Bank of England* (17 C. B. at p. 175), where it was treated as undoubted law that negligence did not invalidate the title of a person taking a negotiable instrument in good faith and for value. I think, therefore, that the rule of law enunciated by Parke B. as firmly established is the existing law. No authority to the contrary was cited at the Bar, unless it be the recent case in this House of *Sheffield* v. *London Joint Stock Bank* (13 App. Cas. 333). Now it is certain that none of the noble and learned Lords who took part in that judgment criticised or questioned, much less purported to overrule, any prior authority. I will state what I understand to be the grounds of the judgment. The person from whom the bank took the securities in that case was himself a pledgee of them; as such he had an undoubted right to repledge them. He, in fact, repledged them as security for a sum exceeding that for which he held them in pledge. They were with a number of other instruments, some negotiable and others not negotiable, made security for his entire indebtedness to the bank. The question which arose was whether the bank could insist on retaining them for the larger sum, or whether the owner could redeem them on paying to the bank the amount for which they were originally pledged. The noble and learned Lords came to the conclusion, as I understand, that the bank knew that Mozley held the securities in question as pledgee only in respect of an advance made upon them, or that if they did not actually know this, what they knew of the nature of his business as a money-lender, and the information which they derived from their transactions with him, made it almost certain that this was the case. That knowing or having every reason to believe that his title was only that of pledgee for a limited advance, they knew, or had

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reason to believe that in pledging them to the bank for his entire indebtedness he was exceeding any authority he had to deal with them. That under these circumstances it was incumbent upon them to make some further investigation if they wished to insist upon their security to the full extent. That the circumstances, as it was said, put them upon inquiry. I gather that their Lordships must further have been of opinion that if the bank had made reasonable inquiries they would have ascertained the facts and have thus had distinct knowledge of circumstances which would have made it appear that they could not hold the securities for anything beyond the advance in respect of which Mozley held them, and that in offering them as a security for a greater sum Mozley was exceeding any authority he had to deal with them. My reason for inferring that their Lordships entertained this opinion is that I apprehend that when it is said that a person is put on inquiry the result in point of law is that he is deemed to know the facts which he would have ascertained if he had made inquiry. He cannot better his position by abstaining from so doing. On the other hand, his position cannot be worse than it would have been had he made inquiry and been in possession of the result of it. Supposing Mozley had been questioned as to his right to deal with the securities, and had given a satisfactory assurance, and there had been no reason to doubt his honesty, I cannot but think that the decision of this House would have been different. There was in the case then before the House, however, no ground for supposing that if Mozley had been asked the question the facts would not have been elicited. When once the conclusion was reached that the bank must be taken to have known that Mozley was exceeding any rights which he possessed in relation to the securities in purporting to pledge them for the sum he did, it followed that it would be contrary to good faith for the bank to retain them for anything beyond the sum for which he could legitimately pledge them, that as regards the excess the bank though holders for value were not holders of the securities in good faith. It will thus be seen that the judgment, which certainly did not purport to be a new departure or to lay down any principle of law differing from that already established, turned entirely upon the view taken of the facts. It would be unbecoming as it is unnecessary for me to express any opinion

whether the findings were warranted by the facts proved. It is enough for me to say that the judgment leaves untouched what I believe to have been down to that time the established rule of law, that a person taking a negotiable instrument in good faith and for value obtains a title valid against all the world. *Sheffield* v. *London Joint Stock Bank* (13 App. Cas. 333) may perhaps be a binding authority as to the conclusions of fact arrived at, where the facts are identical, but not otherwise. In any other case the tribunal must investigate the facts for itself and determine whether those who claim to hold a negotiable instrument have made out that they took it in good faith and for value. One word I would say upon the question of notice, and being put upon inquiry. I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry.

Applying myself now to the facts of the present case, I cannot find any warrant for such conclusions of fact as those which, as I think, led to the recent judgment of your Lordships' House on which so much reliance has been placed. The bank did not know, and had no reason to know, in what capacity Delmar became possessed of the bonds. They might be his own; he might be purchasing them for himself or a principal, and be seeking by an advance from the bank to obtain the means of paying the price, or they might be bonds on which he had himself made an advance. I cannot see that there was anything to suggest to the bank that he was committing a wrong or to make it reasonable and right that they should make further inquiry before entering upon the transaction. It was suggested, and this view seems to have found some favour with the Court below, that though the bank might have been justified in thinking that Delmar had the power to pledge the bonds for an advance to their full market value, they were not justified in supposing that he could be entitled to pledge them en bloc with other securities for a lump sum. If the course of dealing between the

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bank and Delmar was, as alleged, such that he was entitled at any time to obtain back any of the securities deposited on delivering others of an equal value, the distinction does not strike me as very important. But even if it could be material were the plaintiff seeking to redeem his bonds, and the question were for what sum the bank could claim to retain them, it does not seem to me to be material in the present case, where the plaintiff is not seeking to redeem the bonds, but insists that the bank have no title to them at all.

Further, assuming for the moment that the bank were put on inquiry and ought to have asked Delmar whether the bonds were his, and if not, by what title he claimed to deal with them in the manner proposed, can it be doubted what would have been the result of such an inquiry? Why your Lordships have listened to an elaborate argument, for which there was ample scope, designed to establish that the bonds were in fact Delmar's, and that if he had answered, as I think he undoubtedly would, that the bonds were his own, his answer would have been accurate. How can it possibly be contended that if the bank had made further inquiry they would have ascertained that Delmar was not entitled to make the pledge on which the bank take their stand?

My Lords, I have made these observations for the purpose of shewing the marked distinction which there is between the facts of the present case and those which had to be considered in *Lord Sheffield's Case* (13 App. Cas. 333). But I desire to rest my judgment upon the broad and simple ground that I find, as a matter of fact, that the bank took the bonds in good faith and for value. It is easy enough to make an elaborate presentation after the event of the speculations with which the bank managers might have occupied themselves in reference to the capacity in which the broker who offered the bonds as security for an advance held them. I think, however, they were not bound to occupy their minds with any such speculations. I apprehend that when a person whose honesty there is no reason to doubt offers negotiable securities to a banker or any other person, the only consideration likely to engage his attention is, whether the security is sufficient to justify the advance required. And I do not think the law lays upon him the obligation of making any inquiry into

the title of the person whom he finds in possession of them; of course, if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction the case would be different, the existence of such suspicion or doubt would be inconsistent with good faith. And if no inquiry were made, or if on inquiry the doubt were not removed and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting.

For the reasons I have given, I think the judgment appealed from ought to be reversed.

LORD HALSBURY, L.C., LORDS WATSON, MACNAGHTEN, and FIELD agreed.

HENDERSON v. ARTHUR.

'By the general rules of the Common Law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement.'—Per Lord Denman, C.J., in *Goss* v. *Lord Nugent* (1833) 5 B. & Ad. at p. 64.

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APPEAL from the judgment of Lord Alverstone C.J. in an action tried by him without a jury.

The action was by lessor against lessee for a quarter's rent upon a covenant in a lease for payment of rent. By indenture of lease, dated November 28, 1904, the plaintiff had demised a theatre to the defendant, to hold for the term of fourteen years, 'yielding and paying therefor during the said term the yearly rent of 2500*l*. . . . . to be paid in advance during the said term by equal quarterly payments' on the days specified in the lease, and the defendant covenanted with the plaintiff to 'pay the said yearly rent hereby reserved at the times and in manner hereinbefore appointed.' The defence set up was that, by a parol agreement made between the plaintiff and the defendant antecedently to the execution of the lease, the plaintiff had agreed to take a bill, payable at three months, by way of payment of each quarter's rent in advance as it became due; and that the defendant had, in accordance with that agreement, tendered to the plaintiff his acceptance for the rent sued for, which the plaintiff refused to take. Evidence of the antecedent agreement was tendered by the defendant, but was objected to by the plaintiff's counsel as inadmissible. No claim was set up by the defendant for rectifica-

tion of the lease. The Lord Chief Justice admitted the evidence, and, finding that the alleged agreement was proved,[1] gave judgment for the defendant.

COLLINS, M.R.—This is an appeal from the judgment of the Lord Chief Justice in an action upon a covenant for payment of rent in a lease. The covenant sued upon is, in effect, for the payment of the rent reserved in advance by equal quarterly payments on the days specified in the lease. The terms of that covenant are perfectly clear, and their meaning appears to me unquestionably to be that the rent shall be paid in advance in cash. The defence set up by the defendant is that there was an agreement antecedent to the lease in point of time, by which the parties agreed that, instead of payment in advance of each quarter's rent in cash, the lessor should be satisfied by the lessee's giving in respect thereof bills at three months. Assuming that there was in fact such an agreement, the question is whether it is legally available for the purpose of defeating the claim of the lessor upon the covenant. It seems to me that to admit evidence of such an agreement as being so available would be to violate one of the first principles of the law of evidence; because, in my opinion, it would be to substitute the terms of an antecedent parol agreement for the terms of a subsequent formal contract under seal dealing with the same subject-matter. I do not see how, in this case, the covenant in the lease and the antecedent parol agreement can co-exist, and the subsequent deed has the effect of wiping out any previous agreement dealing with the same subject-matter. It was somewhat faintly suggested that the agreement relied upon was a collateral agreement in the nature of a condition upon which the lease was entered into by the defendant. But it appears to me, when the terms of the agreement are looked at, that it is not a merely collateral agreement, but provides in another and contradictory manner for doing what was subsequently provided for by the lease. Under these circumstances I think that the agreement relied upon was not admissible in evidence, and that the appeal must therefore be allowed.

[1] The plaintiff denied that there had been such an agreement as alleged, and appealed against this finding, but it became unnecessary to discuss this question, as the Court of Appeal held that the existence of such an agreement would be immaterial.

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COZENS-HARDY, L.J. I agree, and have very little to add. We are asked, as it appears to me, to give effect to an antecedent parol agreement in order to contradict the terms of the lease, and to give it a meaning different from that which the law would otherwise give to it. To do so would, I think, be contrary to the general principles of the law of evidence. The terms of an antecedent agreement made by parol may be very material in a case where it is a question of the rectification of a written contract on the ground that it does not give effect to the real agreement between the parties, but it is only in such a case that the Court can take such an agreement into consideration.

FARWELL, L.J., delivered judgment to the same effect.

Appeal allowed.

SMITH v. WILSON.

'It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages.' —Per Parke, B., in *Hutton* v. *Warren* (1836) 1 M. & W. at p. 475.

'It is perfectly true that you have no right to qualify or alter the effect of a written contract by parol evidence; but it is perfectly competent to you to qualify or alter by parol evidence the meaning of the words which apparently form the written contract, and to insert the true words which the parties intended to use. That is not to alter the contract, but to shew what the contract is. Wherever the words used have, by usage or local custom, a peculiar meaning, that meaning may be shewn by parol evidence.' —Per Alderson, B., in *Grant* v. *Maddox* (1846) 15 M. & W. at p. 745.

SMITH *v.* WILSON (1832) 3 B. & Ad. 728

This was an action for the breach of the following covenant in a lease, whereby the defendant demised to the plaintiffs, inter alia, a warren; 'That at the expiration of the term, they, the plaintiffs, would leave on the warren 10,000 rabbits or conies, the defendant paying 60l. per thousand for the same; and for any more than that number at that rate, the number to be esti-

mated by two indifferent persons, one to be chosen by each party.' Averment that, at the expiration of the term, the plaintiff left more than 10,000, to wit, 19,200 rabbits upon the warren, but that the defendant would not pay for the same. Plea, non est factum. At the trial before Garrow B., at the Summer Assizes for Suffolk, 1831, it appeared that, at the expiration of the term, the number of rabbits on the warren was estimated by two indifferent persons chosen by the parties, to be 1600 dozen. It was contended for the defendant, that, according to the custom of the country, the 1600 dozen should be computed at 100 dozen to the thousand; and, therefore, that the defendant was liable to pay but for 16,000 rabbits. On the other hand, it was insisted for the plaintiffs, that the words per thousand must be understood in the ordinary sense, and that the defendant ought to pay for 19,200 rabbits, being 1600 dozen. The defendant paid into Court a sufficient sum to pay for 16,000 rabbits. Evidence was offered by the defendant to shew that the term thousand, as applied to rabbits, meant, in that part of the country, 100 dozen. This evidence was objected to, but received by the learned Judge: and he directed the jury to find for the defendant, if they thought it was proved that the word thousand, as applied to rabbits, meant 100 dozen. A verdict having been found for the defendant, a rule nisi was obtained for a new trial, on the ground that the evidence had been improperly received.

LITTLEDALE, J.—Words denoting quantity are undoubtedly to be understood in their ordinary sense, where no specific meaning is given to them by statute or custom. But here the ordinary meaning of the word thousand, as applied to rabbits, in the place where the contract was made, was one hundred dozen. The word hundred does not necessarily denote that number of units, for one hundred and twelve pounds is called a hundred weight; so, where that term is used with reference to ling or cod, it denotes six score: and there being therefore no precise meaning affixed by the Legislature to the word thousand as applied to rabbits, I think that parol evidence was admissible to shew, that in the country where the contract was made the word thousand meant one hundred dozen.

PARKE, J.—The only question is, whether the evidence has been

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properly received. Assuming that it has, the jury have found that, according to the custom of the country, there was an understanding between the parties to this contract that the defendant should pay for the rabbits, computing them at the rate of 100 dozen to the thousand. The rule deducible from the authorities on this subject is correctly laid down in 3 Starkie on Evidence, 1033. 'Where terms are used which are known and understood by a particular class of persons, in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of applying the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties in framing their contract had made use of a foreign language, which the Courts are not bound to understand. Such an instrument is not, on that account, void; it is certain and definite for all legal purposes, because it can be made so in evidence through the medium of an interpreter. Conformably with these principles, the Courts have long allowed mercantile instruments to be expounded according to the custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters.' Although that principle has been more frequently applied to mercantile instruments than to others, it is not confined to them; and, if the word thousand, as applied to the particular subject-matter of rabbits, had, in the place where this contract was made, a peculiar sense, I think that parol evidence was admissible to shew it. In an action upon a contract for the sale of 1000 deals, it would, I think, be competent to shew that the word thousand meant more than it would in its ordinary sense. I agree that where a word is defined by Act of Parliament to mean a precise quantity, the parties using that word in a contract, must be presumed to use it in the sense given to it by the Legislature, unless it appear from other parts of the contract that they used it differently. But that is not the present case. No specific meaning has been given by the Legislature to the word thousand as applied to rabbits, and, therefore, it must be understood according to the custom of the country: and evidence was admissible to shew what that was.

LORD TENTERDEN, C.J., and TAUNTON, J., delivered judgments to the same effect.

Rule discharged.

'If the instrument shews that it was meant to contain the whole bargain between the parties, no extrinsic evidence can be admitted to introduce a term which does not appear there. But if it be clear that the written instrument does not contain the whole, and the jury find that there was a distinct collateral verbal agreement between the parties, not inconsistent with the written contract, the law does not prohibit such distinct collateral agreement from being enforced.'—Per Erle, C.J., in *Lindley* v. *Lacey* (1864) 17 C. B. (N.S.) at p. 586.

MORGAN *v.* GRIFFITH (1871) L. R. 6 Ex. 70

Appeal by defendant from the Northamptonshire County Court.

This action was brought by William Griffith, plaintiff, to recover from George Morgan, defendant, compensation for damage done to the grass and crops of the plaintiff 'in consequence of the breach by the defendant of his promise to keep down and destroy the rabbits on the land hired by the plaintiff of the defendant.'

At the hearing of the cause the following facts were proved :—

The plaintiff, who is a farmer and cattle-dealer, agreed in the summer of 1867 to hire of the defendant some grass land from Michaelmas Day in that year on the terms of a lease which was to be signed at some future time. He entered on the land as tenant on the Michaelmas Day, and soon afterwards found the land overrun with rabbits, which did considerable damage. Prior to Lady-day, 1868, the lease was presented to him for signature, but he refused to sign it if he was to be annoyed by the rabbits in future as he had been before, and did not sign it. Upon paying his March rent he complained to the defendant of the annoyance he was suffering, and expressed his determination not to continue in occupation unless the rabbits were destroyed. The defendant thereupon promised to destroy them. At Michaelmas, 1868, the lease was again tendered by the defendant to the plaintiff for signature, when he complained a second time of the number of rabbits on the land, and refused to sign or continue to hold the land beyond the then current year unless the defendant undertook their destruction. The defendant then said, according to the plaintiff's evidence, 'I promise you faithfully they shall be destroyed,' and the plaintiff requested that a term to that effect should be inserted in the lease. The defendant refused compliance, but again promised that the rabbits should be destroyed, and the plaintiff accordingly signed the lease in its original form. It

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demised the land at a specified rental from year to year as from Michaelmas, 1867, and contained a stipulation that the tenant should not shoot, hunt, or sport on the land, or destroy any game, but would use his best endeavours to preserve the same, and would allow his landlord or friends at any time to hunt, shoot, or sport on the land.

The defendant failed to destroy the rabbits as he had promised, and the plaintiff, finding that they were even more troublesome than before, gave notice to quit, and quitted at Michaelmas, 1870. He afterwards brought this action.

The defendant denied that he had given the promise, and further contended that, even if given in fact, it could not be received in evidence, inasmuch as it added to, and varied and was inconsistent with, the express terms of the lease. The judge considered that evidence of it was admissible, and asked the jury whether the lease had been signed by the plaintiff on the express promise by the defendant to destroy the rabbits. They found in the affirmative, and a verdict was entered for the plaintiff. The defendant appealed against the ruling of the judge; and the question for the Court was, whether the judge was right in admitting the parol evidence of the defendant's alleged promise, and in his direction to the jury.

Aspland, for the defendant. The plaintiff cannot rely on the contemporaneous verbal promise of the defendant. He is bound by the lease, and no new term can be added to it by parol evidence: *Goss* v. *Lord Nugent* (5 B. & Ad. 58); *Ramsden* v. *Dyson* (Law Rep. 1 H. L. 129). It cannot be said that the agreement is wholly collateral. The plaintiff desired to have it embodied in the lease, but the defendant refused. It was one of the terms of the taking, which, not being reduced into writing with the others, cannot be enforced: *Powell* v. *Edmunds* (12 East, 6); *Emery* v. *Parry* (17 L. T. (N.S.) 152). It imposes on the landlord an additional onerous obligation, and is inconsistent with the full enjoyment of the right of shooting for pleasure which is contained in the lease: *Jeffryes* v. *Evans* (19 C. B. (N.S.) 246; 34 L. J. (C. P.) 261). This inconsistency distinguishes the present case from *Lindley* v. *Lacey* (17 C. B. (N.S.) 578; 34 L. J. (C. P.) 7), where evidence of an agreement wholly collateral to the written

one, and relating to a different subject-matter, was admitted. Again, there was no consideration for this verbal promise. MORGAN v. GRIFFITH

[KELLY, C.B.—The signature of the lease was a good and sufficient consideration. Suppose the plaintiff had refused to sign on the ground that the defendant had declined to promise to keep down the rabbits, and the defendant had filed a bill for specific performance in equity, or brought an action at law for non-performance of the agreement, in the former case no decree would have been made unless on the terms of the defendant's keeping down the rabbits, and in the latter only nominal damages would be recoverable.]

The plaintiff was already bound to execute the lease.

Arthur Wilson (*Holl* with him), contrà, was not called on.

KELLY, C.B.—All that is possible has been said on behalf of the defendant, but it has failed to convince me. I think the verbal agreement was entirely collateral to the lease, and was founded on a good consideration. The plaintiff, unless the promise to destroy the rabbits had been given, would not have signed the lease, and a court of equity would not have compelled him to do so, or only on the terms of the defendant performing his undertaking. The decision of the county court judge must therefore be affirmed.

PIGOTT, B.—I am of the same opinion. The verbal agreement in this case, although it does affect the mode of enjoyment of the land demised, is, I think, purely collateral to the lease. It was on the basis of its being performed that the lease was signed by plaintiff, and it does not appear to me to contain any terms which conflict with the written document.

Judgment for the respondent.

' There can be no doubt that it is quite competent to the parties to a written agreement to say by parol, "Let us put an end to this agreement," and if that be so, it is, I think, equally competent for them to say by parol, "Let us put an end to this agreement, start afresh, and make an agreement to a particular effect in substitution for the first." In my view this would be so though it might happen that, owing to some statutory provision such as MORRIS v. BARON & CO.

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that contained in the 4th section of the Statute of Frauds, the parol agreement could not, by reason of its not being evidenced in a particular way, be enforced at law, provided the intention of the parties to rescind the first be clear. And this, too, whether the second agreement was entered into before or after a breach of the first.'—Per Lord Atkinson in *Morris* v. *Baron & Co.* at p. 30.

MORRIS *v.* BARON & Co. [1918] A. C. 1

Appeal from an order of the Court of Appeal (Swinfen Eady L.J., Bankes L.J., and A. T. Lawrence J.) reversing a judgment of Bailhache J. so far as appealed against.

The following summary is taken from the judgment of Lord Parmoor:—

'The appellant is a woollen manufacturer, and the respondents are merchants of worsted goods carrying on business at Brook Street, Bradford. On September 24, 1914, the appellant contracted to sell to the respondents 500 pieces of moss blue serge at the prices fixed and on the conditions stated in the memoranda in writing signed by both parties. On March 19, 1915, the appellant commenced an action against the respondents to recover the sum of 888*l.* 4*s.*, the value of goods supplied to that date. The respondents counter-claimed for 934*l.* 17*s.* 3*d.* for the non-delivery of goods in breach of the terms of the contract. When this action was coming on for trial the appellant and respondents made a parol arrangement, and for the purpose of this appeal the terms of such arrangement may be taken to be expressed in a letter of April 22, 1915.

'"Dear Sirs,—As personally arranged between Mr. Morris and Mr. Baron, we herewith confirm the terms agreed upon.

'"Both to withdraw the legal proceedings and instruct the solicitors accordingly, and each to pay his own costs, you to allow 30*l.* (thirty pounds) to us to meet expenses incurred through not fulfilling the orders.

'"The account to be left over for three months so as to give us the opportunity of selling the goods, and the goods not delivered to be kept for us if we ask for them.

'"We have the option of taking up the balance of pieces to complete the order, giving time to make.

'"Yours faithfully,

'"Baron & Co."

'On February 15, 1916, the appellant commenced a second action against the respondents to recover the sum of 888*l.* 4*s.* still due to him. The respondents admitted this claim, subject to their counter-claim for damages for non-delivery of goods. This counter-claim was founded on the April contract of 1915, and alternatively on the September contract of 1914. The trial judge, Bailhache J., gave judgment for the appellant on the counter-claim, but the Court of Appeal reversed this decision, and it is against this order that the appeal is brought.'

Bailhache J., dealing with the case under the contract of April, dismissed the counter-claim on the ground that the respondents could not validly exercise their option while repudiating their obligation to pay. The objection that the counter-claim was not enforceable by the respondents by reason of s. 4 of the Sale of Goods Act, 1893, was raised but not argued; but it was fully argued in the Court of Appeal.

The Court of Appeal held (1.) that the contract of April was an agreement for the sale of goods and was not enforceable; (2.) that, the contract of April being wholly inoperative, the parties must be relegated to their rights under the original contract, on the ground that a written agreement, which was required by the Sale of Goods Act to be in writing, could not be rescinded except by an agreement in writing, and they gave judgment for the respondents on the counter-claim.

Lord Dunedin. My Lords, I do not recapitulate the circumstances of the case, as they have been fully set out by the noble Lord on the woolsack. For the sake of clearness and brevity I shall call the contract of September 24, 1914, contract A and the agreement of April 20, 1915, contract B. As to contract B, there is no memorandum in writing sufficient to satisfy s. 4 of the Sale of Goods Act, if that section applies to it; and its terms have been held to be for the purposes of this case set out in the letter of April 22, 1915. It is admitted that (1.) the legal proceedings which had been instituted in respect of breaches of contract A, which consisted of claim and counter-claim, were withdrawn; (2.) the account for goods delivered under contract A was left over for three months; (3.) 30*l.* was allowed in credit by the plaintiff to the defendants. Upon these facts the case falls to be decided.

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My Lords, the case raises points of law of great nicety, chiefly for the reason that there is a mass of authority, not always consistent, dealing with questions akin to the questions here raised; and that there is a great responsibility on any one in your Lordships' House who attempts to lay down general rules, and in so doing may seem to run counter to the dicta of learned judges in the past. Nor has the case been made easier by the somewhat peculiar manner in which it was treated by the parties and, in consequence of their attitude, by the Courts below.

The action is for the value of goods sold and delivered to the amount of 888*l.* 4*s.* It is not expressly founded on any contract, although the goods were doubtless delivered under contract A. The defence admits the claim as for goods sold and delivered, then sets out contract B, and averring breach counter-claims under that contract. It is true that in the pleading there is made an alternative claim as for breach of contract A, but before the trial judge the whole case for the counter-claim was put and urged on the assumption that contract B was the ruling contract and that the breach had taken place under it. The trial judge found in fact that in terms of contract B the defendants were bound to pay 888*l.* at the end of July, being the date of the expiry of the three months; that they positively refused to do so; and on these facts he held that the counter-claim failed. It is a little difficult to say whether the learned judge held the counter-claim to fail because this maintained attitude of the defendants amounted to a repudiation of the contract; or upon the ground that as the defendants never asked for delivery, except coupled with the assertion that they refused to pay the 888*l.* until delivery was made, that was tantamount to the defendants never really asking for delivery at all. On the learned judge's announcing his decision counsel for the plaintiff said that he had a point which he had not been able to bring forward, namely, that contract B was unenforceable under the 4th section of the Sale of Goods Act, and therefore could not be the foundation of a counter-claim. To this counsel for the defendants retorted that if that were so he might go back to the original contract, to which counsel for the plaintiff replied that he was prepared to deal with that argument. The matter then dropped.

In the Court of Appeal, the learned judges have seemingly

indicated that they were not prepared to agree with the view of the learned trial judge as to the application of the facts to contract B, the plaintiff brought forward his argument that s. 4 of the Sale of Goods Act applied to contract B. This was resisted by the defendants' counsel, as appears from the judgment of Swinfen Eady L.J., who says: 'The question is, was the contract of April 22 an agreement which is within the section and ought it to be in writing? Was it an agreement for the sale of goods? It is contended by the defendants that it was not.' The defendants, however, found salvation in the defeat of their argument, for the Court of Appeal, deciding against them that contract B did fall within the section, proceeded to say that the case was ruled by the case of *Noble* v. *Ward* (L. R. 1 Ex. 117; L. R. 2 Ex. 135), and gave judgment for the counter-claim upon the alternative plea for breach of the original contract A, a view which seems to have been unpressed by the defendants themselves. Accordingly, as the appeal now stands before your Lordships' House, the question to be first decided is whether, assuming that contract B is within the section, the present case really falls within the decision in *Noble* v. *Ward* (L. R. 1 Ex. 117; L. R. 2 Ex. 135).

My Lords, let me first say that I unhesitatingly accept *Noble* v. *Ward* (L. R. 1 Ex. 117; L. R. 2 Ex. 135) as well decided and laying down correct law. The judgment in the Exchequer was the judgment of Pollock C.B. and Bramwell, Channell, and Pigott BB. In the Exchequer Chamber the judgment was given by Willes J., and was concurred in by Blackburn, Mellor, Montague Smith, and Lush JJ. He would be a bolder iconoclast than I am who should say that a judgment resting on the authority of such names did not correctly set forth the law of England. But now comes the question of what exactly it was that *Noble* v. *Ward* (L. R. 1 Ex. 117; L. R. 2 Ex. 135) decided, and that is not so easy to determine as might be expected. For in truth there are three possible views of the true effect of *Noble* v. *Ward* (L. R. 1 Ex. 117; L. R. 2 Ex. 135). I shall examine each of them. First, there is the view, strongly contended for by the appellant at your Lordships' Bar, that, inasmuch as the transaction in that case fell within the 17th section of the Statute of Frauds, which uses the expression 'No contract . . . . shall be

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allowed to be good except,' &c., it was entirely void, and as such could effect nothing either by way of rescission or variation of the anterior contracts: and that as the 4th section of the Sale of Goods Act, like the 4th section of the Statute of Frauds, does not make void a contract, but only prevents enforcing it, contract B in this case, though not enforceable, might yet serve as a defence to get rid of contract A.

My Lords, it is quite true that in the Exchequer Chamber Willes J. uses the expressions 'invalid' and 'void,' and I confess if I could have read the case as reported in the Exchequer Chamber apart from all other authority, I should have come to the conclusion that that was the ground of judgment, and that, to say the least of it, the question was still open when you had something to which s. 4 applied and s. 17 did not. But, on the best consideration I can give, I do not think that would be a safe view. For Lord Blackburn, who was a party to the judgment, distinctly said in the case of *Maddison* v. *Alderson* (8 App. Cas. 467, 488) in this House: 'I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract.' And Brett L.J. in *Britain* v. *Rossiter* (11 Q. B. D. 123, 127) says: 'In my opinion no distinction exists between the 4th and the 17th sections of the statute.'

In view of these opinions I am inclined to think that although, doubtless, *Noble* v. *Ward* (L. R. 1 Ex. 117; L. R. 2 Ex. 135) proceeded on the 17th section, yet the judgment would have been the same had there only been the 4th in question.

The second interpretation is that which the Court of Appeal have here given, adopting and relying on the views of Shearman and Sankey JJ. in the case of *Williams* v. *Moss' Empires, Ld.* ([1915] 3 K. B. 242, 248). It is most succinctly put by Sankey J. in that case: 'A contract which in compliance with the Statute of Frauds is in writing may be rescinded by a new agreement. The new agreement may be one which in order to be enforceable is required to be in writing, or it may be one which is valid though it is not in writing. If it is one which is required to be in writing and is not in writing, it is unenforceable and cannot be treated as

evidence that the original contract has been rescinded, and the original contract, therefore, remains in force. But if the new agreement is in writing, or, if verbal, is one which need not be in writing, the new agreement is valid and the original contract is rescinded.' It must be kept in view that this statement of the law is given after Shearman J. had cited the series of cases *Goss* v. *Lord Nugent* (5 B. & Ad. 58), *Noble* v. *Ward* (L. R. 1 Ex. 117 ; L. R. 2 Ex. 135), *Stead* v. *Dawber* (10 Ad. & E. 57), *Giraud* v. *Richmond* ((1846) 2 C. B. 835), *Marshall* v. *Lynn* ((1840) 6 M. & W. 109), and *Stowell* v. *Robinson* ((1837) 3 Bing. N. C. 928). It will be noticed at once that the learned judge ignores the distinction between variation and rescission. The contract with which he was dealing was obviously a case of variation. There had been an engagement for three years at a certain salary. A verbal arrangement was made whereby the amount of salary was altered ; all other terms of the original contract remained. Indeed, the learned judge says in so many words that no such distinction exists where the alteration is a material one. He says : ' I think some confusion has arisen from the use of the words " variation of a contract." The result of varying the terms of an existing contract is to produce, not the original contract with a variation, but a new and different contract.'

My Lords, I find myself unable to subscribe to this view. The difference between variation and rescission is a real one, and is tested, to my thinking, by this : In the first case there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist ; in the second you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed. When I say you could sue on the second alone, that does not exclude cases where the first is used for mere reference, in the same way as you may fix a price by a price list, but where the contractual force is to be found in the second by itself.

Now each and every of the cases cited (leaving aside for the moment *Noble* v. *Ward* (L. R. 1 Ex. 117 ; L. R. 2 Ex. 135)) were attempts to vary ; in not one of them was it a case of

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rescission. *Noble* v. *Ward* (L. R. 1 Ex. 117 ; L. R. 2 Ex. 135), though also a case of attempted variation and decided as such, yet had in it the distinction which Shearman J. ignores. In that case there were what Lord Bramwell called contracts A, B, and C. A and B were in writing, C was a parol contract. It was entered into when A and B were both extant and partially performed. Now it was held that C could not vary B, but there was no difficulty made as to its rescinding A. I do not mean that this was decided upon adverse contentions, for neither party maintained that A was to go on. But still the only thing that rescinded or abrogated A was C, and had the plaintiff in that case claimed damages under A as well as under B I do not doubt that the plea that A was abrogated would have been sustained. This brings me to the third view of *Noble* v. *Ward* (L. R. 1 Ex. 117 ; L. R. 2 Ex. 135), which I humbly think is the correct one. The criterion does not lie in the question of whether the later contract is itself a contract which needs to be in writing. The criterion is in the question whether what is intended to be effected by the second contract is rescission or variation. *Noble* v. *Ward* (L. R. 1 Ex. 117 ; L. R. 2 Ex. 135) decided that if the second contract fell within the statute then it could not be appealed to to vary the former ; but it did not decide that it could not be appealed to to rescind.

Willes J., in giving judgment and speaking of the later contract, and of the fact that a verbal contract to rescind simpliciter was quite good, says : ' But it would be at least a question for the jury, whether the parties did intend to rescind.' That contract B, if it falls within s. 4, is not gone altogether although not enforceable is clear from the passage already cited from Lord Blackburn, and the like is said in the same case by Lord Selborne (8 App. Cas. 474) : ' It has been determined at law (and, in this respect, there can be no difference between law and equity) that the 4th section of the Statute of Frauds does not avoid parol contracts, but only bars the legal remedies by which they might otherwise have been enforced.' If, then, the contract exists its existence must be treated as a fact, and it must be looked at to see if apart from enforceability it did or did not put an end to the former contract. For it would be an extraordinary result that although a parol contract to rescind a written contract

is good, as to which there is no doubt (*Goman* v. *Salisbury* ((1684) 1 Vern. 240) and Willes J. in *Noble* v. *Ward* (L. R. 2 Ex. 135)), yet the same thing cannot happen if after rescinding the first contract the parties go on to make another contract which may or may not be enforceable. Accordingly, if express words to that effect are used there can be no doubt. It seems to follow that implication may do as well as express words. But here there must be a note of warning. If the implication be no more than this, that the second contract if valid would displace the first, that by itself is not enough, for, as Willes J. says in *Noble* v. *Ward* (L. R. 2 Ex. 138), ' It is quite in accordance with the cases of *Doe* d. *Egremont* v. *Courtenay* ((1848) 11 Q. B. 702) and *Doe* d. *Biddulph* v. *Poole* ((1848) 11 Q. B. 713), overruling the previous decision of *Doe* d. *Egremont* v. *Forwood* ((1842) 3 Q. B. 627), to hold that, where parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights. This is good sense and sound reasoning, on which a jury might at least hold that there was no such intention.' The cases there cited are all cases of surrenders of leases upon new leases granted in which it was held that the surrender, whether express or implied, was conditional upon the new lease being good.

I now turn to the facts in this case. There had been alleged breach of contract A on both sides, and action raised with counterclaim. Now the first term of the new contract B is to put each party to withdraw legal proceedings ; then to give three months' credit to the defendants in the payment of a sum admittedly due for goods already delivered ; then to allow them 30*l.* in satisfaction of the expenses they had incurred by reason of non-delivery under contract A ; and lastly to substitute for the right of the plaintiff to supply and the duty of the defendants to take 277 pieces of cloth, an option on the defendants' part to take them if they pleased.

My Lords, it seems to me impossible to come to any conclusion on this but that the parties agreed that the old contract should be abrogated. I use the word ' abrogate,' because I think it is a better word than ' rescind ' when you deal with a contract which has been partly implemented, but as regards the authorities

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I might as well say 'rescind.' Further, as regards this arrangement there cannot be a restitutio in integrum. The defendants have had the extended credit, have had the 30*l.* placed to their credit, and have enjoyed an option not to take, which, if the market had been a falling one instead of a rising one, they would probably have availed themselves of; and these advantages have been enjoyed and cannot be taken away. In respect of these things the old contract was to be held abrogated. But the judgment of the Court of Appeal leaves the defendants with all these advantages and yet holds the old contract binding still.

I am fortified in my view by a passage in Fry on Specific Performance (3rd ed.). Sect. 1039 is as follows: 'But where the new contract is relied on only as an extinguishment of the old one, the mere fact that it is not in writing, and so could not be put in suit, seems to be no ground for denying its effect in rescinding the original contract. The Statute of Frauds does not make the parol contract void, but only prevents an action upon it; and it does not seem to be necessary to the extinction of one contract by another that the second contract could be actively enforced. The point has never, it is believed, been matter of decision. But in point of principle it seems to stand on the same footing as a simple agreement to rescind.'

I am therefore of opinion that the present case is not ruled by *Noble* v. *Ward* (L. R. 1 Ex. 117; L. R. 2 Ex. 135), because the question here is not whether contract A was varied by contract B, but whether it was rescinded by contract B, and on the facts I hold that it was.

There remains the question whether the defendants can sue for breach of contract B in so far as that contract is a contract for sale of the 277 pieces of cloth. I think they cannot for several reasons. In the first place, I think, though with some hesitation, that it falls within the 4th section of the Sale of Goods Act, and cannot therefore, being a parol contract, be actively enforced. I say 'with some hesitation,' because, looking at the 4th section, I cannot help feeling that the section was meant to deal with what I may call pure contracts of sale, and not contracts dealing with other arrangements as well; and I have felt doubts as to whether when, as here, you have a composite arrangement, dealing with the getting rid of competing claims under an old contract

as well as providing for the supply of goods in the future by way of sale, the section ought to apply. But on the whole I have come to the conclusion that in so far as implement of that portion which is sale is asked the section must apply. But further and apart from that, and taking the case as it was taken by Bailhache J., I agree with the conclusion he reached. I think that the maintained attitude of the defendants under no circumstances to pay the 888*l.* unless delivery were first made was equivalent to repudiation, but I do not find such an unqualified acceptance on the plaintiff's part of that repudiation as to amount to rescission. But I think also that the payment of the 888*l.* at the end of the three months was a consideration going to the root of the contract because it was the counterpart of the plaintiff's forbearance to sue and the grant to the defendants of an option to take instead of the old duty to take, and that it was not in the position of an ordinary payment of instalment which would make the case fall within the lines of *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (9 App. Cas. 434). Accordingly, being a stipulation going to the root of the contract, the defendants have all along been in breach, and cannot call on the plaintiff to implement his part; and thus there can be no damages.

Lord Finlay, L.C., Viscount Haldane, Lords Atkinson and Parmoor agreed.

Order of the Court of Appeal reversed and judgment of Bailhache J. restored.

'The doctrine of "ejusdem generis" is that you treat general words which might under certain circumstances have a wider meaning as being restricted because, according to the true construction of the immediately preceding expression, you find it to designate things which may properly be described as belonging to the same genus.'—Per Kennedy, L.J., in *Tillmanns & Co.* v. *S.S. Knutsford, Limited* [1908] 2 K. B. at p. 408.

Thorman *v.* Dowgate Steamship Company Limited [1910] 1 K. B. 410

Action in the commercial list tried by Hamilton J. without a jury.

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The plaintiff's claim was admitted, subject to a counterclaim by the defendants, as owners, against the plaintiff, as charterer of the steamship *Aldgate*, for demurrage at Hull, the port of loading.

The charterparty was dated July 19, 1907, and provided that 'the *Aldgate* . . . now at Rotterdam . . . shall, with all convenient speed, proceed to Hull (Alexandra Dock) as ordered by charterer, and there take on board as tendered in the usual manner, according to the custom of the place, as per colliery guarantee, which owner agrees to accept, a full and complete cargo of coal not exceeding 5200 tons . . . Demurrage at and after the rate of 16*s.* 8*d.* per hour . . . Steamer to be loaded in 120 hours on conditions of usual colliery guarantee.'

The colliery guarantee, which, as the learned judge found, was accepted by the defendants as being in the usual form, was, so far as is material, in the following terms:—'I guarantee to load the s.s. *Aldgate* with about — tons (cargo only) of coals in — hours (Sundays, bank holidays, cavilling days and colliery holidays excepted). Time not to count until after the said steamer is wholly unballasted and ready in dock to receive her entire cargo. Strikes of pitmen or workmen, frosts or storms, and delays at spouts caused by stormy weather, and any accidents stopping the working, leading, or shipping of the said cargo, also restrictions or suspensions of labour, lock-outs, delay on the part of the railway either in supplying wagons or leading the coals, or any other cause beyond my control, such stoppage occurring any time between the present date and actual completion of loading, always excepted. . . . Time to count from 6 A.M. following the receipt of notice (in writing) of readiness by Robert Thorman, if the steamer is actually ready as above stipulated, and not before. . . . Should the colliery be off work through any cause whatever, time not to count.'

The facts of the case as found by the learned judge and stated in the judgment, were as follows:—

'The *Aldgate* arrived at Hull, was admitted to the Alexandra Dock, and had given a notice by July 23, 1907, at 9 A.M.; but she was not allowed by the ordinary regulations of the dock to go under the loading spout, where alone coal could be loaded, until midnight of the night between August 1 and 2. She was thereafter loaded, not without some delay and stoppage, but

relatively small, and got away on August 7, and, therefore, if the vessel was entitled to claim that her lay hours commenced on July 23 at 9 A.M., she was on demurrage before she got under the spout and could be loaded at all; whereas, on the other hand, if her laying time did not commence until she got under the spout, then, having regard to the interposition of sundry excepted days, namely, Sunday and bank holiday, she would not have been upon demurrage. When she came to the port Hull was busy with coal. The plaintiff said that there were a good many ships, but not more than the railway and dock could have dealt with if properly organized, and Hull could have dealt with much more coal. Mr. Parkinson, agent at Hull for the Denaby and Cadeby Main Colliery, which was the colliery whose coals were designated for the ship's cargo, said that at this time there were difficulties arising from the condition of traffic on the railway. The colliery was turning out sufficient coal for the daily loading of such ships as could be loaded, but it had difficulty in leading the coal down to Hull owing to the railway company being short of engine power, as will happen to railway companies from time to time when their business is flourishing, and the provision of engine power has not been kept up in advance so as to deal with the traffic coming in.

'When coal was consigned from the colliery it was consigned to the office of the colliery agent at Hull, not ticketed or labelled or consigned to any particular ship, but consigned to Mr. Parkinson generally, so that he could direct it to be tipped into whatever ship happened to be under the tip at the time. The regulations of the dock almost necessarily required that ships which had to be loaded under a particular appliance should be loaded in their turn of arrival. It was said in terms by Mr. Parkinson that if the *Aldgate* had got under the tip earlier she would then have got the coal which came down earlier. There was coal at the tip, subject to casual delays there; there was coal coming down by the railway to the tip adequate for the supply of the vessels that got to the tip in their turn; and the conclusion of fact, therefore, at which I arrive upon the evidence is that what prevented the vessel from getting to the tip any earlier than the night of August 1 and 2 was the fact that there were other vessels in turn of arrival before her at Hull, and I accept also the evidence of the plaintiff

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that, though numerous, the ships were not more than the railway and dock could have dealt with if properly organized. The conclusion is that in the ordinary course of the business at the Hull dock the vessel took her turn, and, there happening to be other vessels in turn before her, she was thereby, and not otherwise, prevented from getting to the tip where she had to take her cargo any earlier than she did.'

HAMILTON J., after stating the facts as set out above, continued as follows :—It is contended by the defendants that their vessel was what is called an arrived vessel on July 23 at 9 A.M., that her lay hours ran out before any coal was put on board, that after that she was loaded while she was on demurrage, that no exceptions in the contract prevented or suspended the running of the lay hours from July 23 at 9 A.M., and that if any matters within those exceptions arose after the loading began, as the vessel was already on demurrage, they do not avail to protect the charterer. On the other hand, the charterer says, firstly, that she was not an arrived vessel until she got under the tip, the risk of delay between arrival in dock and arrival under the tip being, under these two instruments, upon the ship ; and secondly, that the delay which occurred after the vessel arrived in dock is within the exceptions which prevent the lay hours from running ; that when she began to load she was loaded with despatch and within her time ; although there were some delays, comparatively small, which would be in themselves excepted under the same exceptions in the charterparty.

I will first deal with the question when was she an arrived vessel ? The charterparty provides that she is to proceed to Hull, Alexandra Dock, as ordered by charterer ; and the charterer selected the Denaby and Cadeby Main Colliery as the one whose coals were to be loaded. The colliery guarantee says : ' Time not to count until after the said steamer is wholly unballasted and ready in dock to receive her entire cargo,' ' or any other cause beyond my control always excepted.' ' Time to count from 6 A.M. following the receipt of notice (in writing) of readiness by Robert Thorman if the steamer is actually ready as above stipulated, and not before.' I think that means that the time is to count when the vessel is wholly unballasted and ready in dock

to receive her entire cargo, subject to the other stipulations as to notice in writing of readiness, and so forth. The charterparty itself is a charter to proceed to a named dock in a named port, and, unless the words 'as ordered by charterer' alter it, she would have arrived at her destination under the ordinary rule when she was in the dock; but even if the words 'as ordered by charterer' would bind the vessel to tender herself at the spot ordered by the charterer, I am still of opinion that the words in the guarantee fixing when time is to count, and fixing it negatively by a provision as to what is to happen before time is to count, would cause the time to run from the moment when she was wholly unballasted and ready in dock. I hold this on the construction of the charterparty and guarantee as well as on the authority of *Monsen* v. *Macfarlane* ([1895] 2 Q. B. 562), where the charterparty incorporated a colliery guarantee indistinguishable on this point from the present case, except that there the designation of the spot to be selected by the charterers in the dock was much more distinct, and it was held that the time began to run as per colliery guarantee, giving direct effect to its words, after the ship was wholly unballasted and ready in dock at Grimsby, although the charterparty had stipulated that she was to proceed to a customary loading place in the Royal Dock, Grimsby, as required by charterers. It was argued, however, that upon the construction of the charterparty itself the ship was not an arrived ship until she got under the tip, and the case of *Shamrock Steamship Co.* v. *Storey* (4 Com. Cas. 80) was cited, in which Bigham J. said that the words in the charterparty to load 'in the usual manner according to the custom of the place,' 'from such colliery or collieries as the charterers may direct,' shewed that the time for loading was not to be deemed to run until the vessel was under the tip; but it is evident from the learned judge's observations (ibid. at p. 84; and see 5 Com. Cas., at pp. 23, 24), 'whether my reading of the charterparty without the words as to the guarantee be right or wrong, the defendants are entitled to succeed,' that his view was, and was intended to be, an obiter dictum. As a matter of fact the terms of the usual guarantee are not set out in the report, the only guide to them being the learned judge's finding on the evidence that the usual guarantee form provided that the time for loading was not to

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begin to run until after the vessel was under the tip, which would decide the matter in a way different from the present case.

The next contention was that, assuming the time began to run when the ship was wholly unballasted and ready in dock on July 23, the loading was prevented by causes which came within the exceptions in the colliery guarantee, which are in the following terms: 'Strikes of pitmen or workmen, frosts or storms, and delays at spouts caused by stormy weather, and any accidents stopping the working, leading, or shipping of the said cargo, also restrictions or suspensions of labour, lock-outs, delay on the part of the railway company either in supplying wagons or leading the coals, or any other cause beyond my control, such stoppage occurring any time between the present date and actual completion of loading.' One has to ask oneself first of all whether it is subject to the application of the canon of construction which is known as the ejusdem generis rule, and, if so, how is it to be construed, or whether there is anything in the clause which prevents the application of that canon of construction. The ejusdem generis rule is a canon of construction only. The object of it is to find the intention of the parties. The instrument, the nature of the transaction, and the language used must all have due regard given to them, and although it is a commonplace to observe it, I think it is important to bear in mind, first of all, that this is a clause of a kind very familiar in ordinary contracts of carriage or contracts connected with the carriage of cargoes; secondly, that this is a charterparty which is of that class where the lay days are fixed or calculable, as distinguished from the class where the obligation is to load in a reasonable time under the circumstances. No doubt if the parties use language appropriate to the purpose, it is open to them to take a charterparty which provides for fixed lay days in one clause and convert it by another into a charterparty to load in a reasonable time. Still, in considering what this instrument means, it has to be borne in mind that the charterparty is of the type which is favourable to the ship, by fixing the lay days, and that to interpret these exceptions upon that provision for fixed lay days as allowing any cause beyond the charterer's control to excuse him would in effect convert it into a charterparty of the opposite type, which is favourable to the charterer and less favourable to the ship.

The mere consideration that so many matters have been carefully enumerated (quite superfluously so, unless some restriction is placed on the subsequent words 'any other cause beyond my control') would lead one to construe that clause according to the ejusdem generis rule, and to say that it was intended by the parties that the time should not count only if the various matters specifically enumerated, or any other cause, similar to them and beyond the charterer's control, interfered with the loading. The defendants relied upon the authority of *In re Richardsons and Samuel* ([1898] 1 Q. B. 261), which is a decision of the Court of Appeal, and it appears to me that, apart from the conclusion which I have arrived at as to the construction of the words, this decision is binding on me because it was stated in the judgment of A. L. Smith L.J., and in no way qualified or departed from in the subsequent judgments, that 'The contention that because the delay arose from the loading of the ships in the port in the order of their arrival the charterer is exempt cannot prevail, for it is impossible to treat delay arising from such a cause as due to accident to the railway or as coming within the term "other causes beyond charterer's control."' Even if that were a dictum unnecessary for the decision in that case, I should have hesitated long before refusing to follow it; but it appears to me that it was necessary for the decision, and as both the subsequent judgments begin by saying that they agree alike in the conclusion and reasoning of the first judgment, I must treat that as a decision of the Court. It is true that it is a decision upon words and also on facts to some extent different from the present case, but it appears to me to be as close to the present case as one could expect the language of a different instrument to be, and to decide that, where there are some accidental matters followed by the words 'other causes beyond charterer's control excepted,' the other causes beyond the charterer's control must be construed in a limited sense with reference to the particular matters specified before, and that, that being so, the mere loading of the ship in the port in the order of its arrival, and therefore of necessity waiting its turn, although no doubt beyond the charterer's control, cannot be said to be within those words in the contract itself.

An argument has been advanced on behalf of the plaintiff that two subsequent cases, both of them decisions of the House

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of Lords, *Larsen* v. *Sylvester* ([1908] A. C. 295) and *S.S. Knutsford, Ld.* v. *Tillmanns* ([1908] A. C. 406), govern this case in his favour, and have in fact altered the law with regard to the construction of mercantile instruments according to the canon of ejusdem generis. It is said that the words in the present clause are not for any useful purpose distinguishable from those in *Larsen* v. *Sylvester* ([1908] A. C. 295), and that a rule was laid down in *S.S. Knutsford, Ld.* v. *Tillmanns* ([1908] A. C. 406) for the interpretation of such a clause as this, a rule, namely, which requires the discovery of some genus including, under one category, all the matters specifically enumerated before the general words can be construed as referring only to such category or such genus, or, in other words, that unless you can form one common category of all the preceding specific matters and connect the general words with it, the general words must be treated as detached from the preceding specific matters and be of a generality limited only by the actual language of the general words themselves.

It is true that the facts in *Larsen* v. *Sylvester* ([1908] A. C. 295) as regards date, cargo, and locality are like those of the present case; but the resemblance or difference of the case for the present purpose must turn upon the words of the particular instrument. It is noticeable that in *Larsen* v. *Sylvester* ([1908] A. C. 295), Lord Robertson having been careful to state, what no other member of the House had in any way expressly doubted, that the ejusdem generis doctrine of construction was both sound and valuable and must be maintained, at the conclusion of the opinions the Lord Chancellor also stated ((1908) 13 Com. Cas. 328, at p. 333) his concurrence in what Lord Robertson had said; and I think, therefore, that it is quite clear that the principle upon which the House of Lords proceeded, following in that respect the decision in the Court below, was to make no change in the accepted rule of construction, to cast no doubt upon either its utility or its application, but to recall that, contrary perhaps to what had been argued in that case and some others, this rule of construction is subordinate to the real intention of the parties, and does not control it; that is to say, that the canon of construction is but the instrument for getting at the meaning of the parties, and that the parties, if they use language intimating such

intention, may exclude the operation of this or, I suppose, any other canon of construction. Accordingly their Lordships found in the words ' any other unavoidable accidents or hindrances of what kind soever,' an attempt as strenuous as language could make it to indicate that the ejusdem generis rule, with which I daresay the parties were familiar, was not to be applied in that case. It may well be that the result of that was that there were two or three lines of surplusage in the charterparty, but when the parties said that ' any other unavoidable accidents or hindrances of what kind soever beyond their control ' were to be excepted, it was impossible to suppose that they had meant that some unavoidable accident or hindrances, although beyond their control, should still leave the charterers liable. The only question, therefore, in applying *Larsen* v. *Sylvester* ([1908] A. C. 295) to the present case is to inquire whether there is any language in this guarantee of like strength and effect. I think there is not. Lower down in this guarantee there is the expression ' Should the colliery be off work for any cause whatever, time not to count.' In the form of guarantee, too, which I understand is generally used, at any rate on the Tyne, and is provided by the North of England United Coal Trade Association, the word 'whatever' is imported into a clause corresponding with the clause in question in this case. Accordingly, I think it is quite reasonable to suppose that the parties entering into this guarantee were fully aware, having the English language at command, that they might carry the matter considerably further if they used the word ' whatever ' (I express no opinion as to how far that would have carried it), and if they had chosen to use the expression ' of what kind soever,' it would pass the wit of man to find language more express or emphatic to indicate the utmost possible generality ; but when they confine themselves to words of specific enumeration, like ' any other cause beyond my control,' I see nothing to derogate from the ordinary canon of construction that those words are subject to a limitation, namely, that of the genus or category which the previous words have indicated.

With regard to *S.S. Knutsford, Ld.* v. *Tillmanns* ([1908] A. C. 406), it is to be observed that in the Court of Appeal, after a long and careful discussion as to how the ejusdem generis rule is to be applied to various classes of instruments, the Court came to the

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conclusion that there was a category in clause 4 of the bill of lading in question, and a common element applying to all the specific matters enumerated therein quite sufficient to enable the words 'any other cause' to be brought within that category, although, whether you call it a category, with Farwell L.J., or a genus, as the other Lords Justices did, no doubt it was a category or a genus lacking in scientific precision; but they found a common element in the references to 'ice, blockade, interdict, war, disturbances,' and so forth, sufficient to enable them to construe the words 'any other cause' as referable to the category so expressed. Considerable discussion arose there as to whether the presumption of law is that general words are general until they can be shewn to be particular, or whether general words are ejusdem generis with the particular words until they can be shewn to be general without any limitation. I do not think it is now necessary to embark upon that discussion. It arose there upon the citation of a case relating to an ante-nuptial settlement. When the case was taken to the House of Lords, I find that Lord Macnaghten said that 'the rule of ejusdem generis applies as laid down in *Thames and Mersey Marine Insurance Co.* v. *Hamilton* ((1887) 12 App. Cas. 484), and I prefer to take the rule on a point of that sort from a case which did deal with bills of lading and shipping documents, rather than from cases that dealt with real property and settlements,' and the rule referred to is thus stated in *Thames and Mersey Marine Insurance Co.* v. *Hamilton* (12 App. Cas. at p. 490) by Lord Halsbury: 'Two rules of construction now firmly established as part of our law may be considered as limiting those words. One is that words, however general, may be limited with respect to the subject-matter in relation to which they are used;'—that, of course, covers the observations which I ventured to make that this is a charterparty with fixed lay days—'the other is that general words may be restricted to the same genus as the specific words that precede them'; and Lord Halsbury added that 'there is perhaps a third consideration which cannot be overlooked, and that is that where the same words have for many years received a judicial construction it is not unreasonable to suppose that parties have contracted upon the belief that their words will be understood in what I will call the accepted sense.' As to that

I may observe that *In re Richardsons and Samuel* ([1898] 1 Q. B. 261) is a case which has long been known to shipping lawyers, and that in my experience the mercantile gentlemen who prepare these documents have a very competent knowledge of the decisions of the Court in recent years. Then in the same case Lord Macnaghten said (12 App. Cas. at p. 501): 'According to the ordinary rules of construction these words must be interpreted with reference to the words which immediately precede them. They were, no doubt, inserted in order to prevent disputes founded on nice distinctions.' That object of the insertion of such words, I am afraid, has not been always successfully attained. 'Their office is to cover in terms whatever may be within the spirit of the cases previously enumerated'; and then a little lower down: 'If, on the other hand, that expression is to receive a limited construction, as apparently it did in *Cullen* v. *Butler* ((1816) 5 M. & S. 461), and loss by perils of the seas is to be confined to loss ex marinæ tempestatis discrimine, the general words become most important. But still, ever since the case of *Cullen* v. *Butler* ((1816) 5 M. & S. 461), when they first became the subject of judicial construction, they have always been held or assumed to be restricted to cases "akin to," or "resembling," or "of the same kind as" those specially mentioned.'

Now, following those observations, it seems to me there is nothing in *S.S. Knutsford, Ld.* v. *Tillmanns* ([1908] A. C. 406) to raise any difficulty in the present case, except this, that one has now to look to see, if there be a genus, what that genus is. Mr. Scrutton contended that it must be a genus which is inclusive, and into which all the previous specifically enumerated matters will enter, and suggested that the expression of Collins L.J. at the end of his judgment in *In re Richardsons and Samuel* ([1898] 1 Q. B. at p. 268) must be taken as now modified in consequence of the decision in *S.S. Knutsford, Ld.* v. *Tillmanns* ([1908] A. C. 406). It does not appear to me that that is necessarily so. I do not understand that anything is laid down in *S.S. Knutsford, Ld.* v. *Tillmanns* ([1908] A. C. 406) which determines that in all instruments and under all circumstances the general words are referable to one category into which all the previously enumerated words must enter as component species, and I see no reason why either the nature of the instrument or the language used might

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not cause the general words to be referred to the specific words either collectively or in groups or individually according to the intention of the parties. It does not appear to me to be a matter of great difficulty to find a common category which will cover all the matters specifically inserted in the present case. It is not necessary that either genus or differentia should be of extreme scientific precision. Mr. Bailhache suggested as the distinction which would constitute a common category that the clause referred to hindrances on the landward side and not on the seaward side. That test is attractive because it is terse and pointed, but I think Mr. Scrutton pointed out with justice that, although it might be relatively unlikely in fact, hindrances which would come within this clause might arise on the seaward side, as, for example, if frosts or storms obstructed the passage of the ship from the dock to the tip, or if a strike of dock employees prevented the sluices or dock gates from being worked, or if an accident occurred, say the sinking of a vessel at the tip which stopped the shipping of the cargo that was there. It appears to me that the common category which covers all this is to be found in the circumstance that the matters enumerated clearly all refer to something extraordinary, something in the nature of a casualty, something accidental or abnormal; not to something occurring in the ordinary course of a flourishing business, though detrimental to the ordinary course of business. That is a common feature quite as precise as the common feature which sufficed in *S.S. Knutsford, Ld.* v. *Tillmanns* ([1908] A. C. 406)—a common feature with an effective business object, and a common feature which excludes the cause of the detention of this vessel upon the evidence of the plaintiff himself, because what, as I find as a fact, prevented the vessel from getting to the tip was that she had to wait her turn. What obliged her to wait her turn was the fact that other vessels had come in before her, and I find as facts that other vessels had come in before her in the ordinary course of the trade of the port, which must have its fluctuations, and was at that time in an exceptionally flourishing condition; that the other vessels had come in the ordinary course of trade, and would have been dealt with without delay in the ordinary course of trade if the railway and the dock, which means the railway lines and appliances at the tip, had been properly organized and

managed; and that although there was congestion and delay on the part of the railway company during this period, that was not the cause of the vessel not getting to the tip, because if it had not been that there had been other vessels in turn before her she would have got straight to the tip, and then would have found coal available for her, the railway congestion notwithstanding.

It seems to me therefore, that reliance cannot be placed in aid of the charterer upon the exceptions in the colliery guarantee, and, that being so, I do not think it necessary to consider the length of time during which it is said that after loading began there was delay on the part of the railway company in supplying wagons or leading the coal; it does not appear to me that they are of any significance, the conclusion having been arrived at that the vessel was already on demurrage before any coal was put on board at all. The result is that there must be judgment for the defendants upon the counter-claim.

Judgment for defendants on the counter-claim.

FROST v. KNIGHT.

'The general rule is, that where there has been what has been called an anticipatory breach of contract going to the whole consideration, it has not of itself the effect of rescinding the contract, for there must be two parties to a rescission. It only has the effect of giving the other party to the contract an option to treat the repudiation of the contract as a definitive breach of it, and thereupon to treat the contract as rescinded, except for the purpose of his bringing an action for breach of it. It gives him the right to do that; but, on the other hand, he may refuse to treat the contract as rescinded, and hold the party repudiating the contract to his obligation when the time fixed for performance arrives.'—Per Collins, M.R., in *Michael* v. *Hart* [1902] 1 K. B. at p. 490.

FROST *v.* KNIGHT (1872) L. R. 7 Ex. 111

COCKBURN, C.J.[1]—This case comes before us on error, brought on a judgment of the Court of Exchequer arresting the judgment in the action on a verdict given for the plaintiff.

The action was for breach of promise of marriage. The promise, as proved, was to marry the plaintiff on the death of the defendant's father. The father still living, the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement, whereupon the plaintiff, without waiting for the father's death, at once brought the present action. The plaintiff having obtained a verdict, a rule nisi was applied for to arrest the judgment, on the ground that a breach of the contract could only arise on the father's death, till which event, no claim for performance could be made, and, consequently, till its occurrence, no action for breach of the contract be maintained. A rule nisi having been granted, a majority of the Court of Exchequer concurred in making it absolute, Martin, B., dissenting; and the question for us is, whether the judgment of the majority was right.

The cases of *Lovelock* v. *Franklyn* (8 Q. B. 371) and *Short* v. *Stone* (8 Q. B. 358), which latter case was an action for breach of promise of marriage, had established that where a party bound

[1] In this judgment Keating and Lush, JJ., concurred.

to the performance of a contract at a future time puts it out of his own power to fulfil it, an action will at once lie. The case of *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q. B.) 455), upheld in this court in the *Danube and Black Sea Co.* v. *Xenos* (13 C. B. (N.S.) 825; 31 L. J. (C. P.) 284) went further, and established that notice of an intended breach of a contract to be performed in futuro had a like effect.

The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q. B.) 455) and *The Danube and Black Sea Co.* v. *Xenos* (13 C. B. (N.S.) 825; 31 L. J. (C. P.) 284) on the one hand, and *Avery* v. *Bowden* (5 E. & B. 714; 26 L. J. (Q. B.) 3), *Reid* v. *Hoskins* (6 E. & B. 953; 26 L. J. (Q. B.) 5), and *Barwick* v. *Buba* (2 C. B. (N.S.) 563; 26 L. J. (C. P.) 280) on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

Considering this to be now settled law, notwithstanding any thing that may have been held or said in the cases of *Philpotts* v. *Evans* (5 M. & W. 475) and *Ripley* v. *McClure* (4 Ex. at p. 359), we should have had no difficulty in applying the principle of the decision in *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q. B.)

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455) to the present case, were it not for the difference which undoubtedly exists between that case and the present, viz., that, whereas there the performance of the contract was to take place at a fixed time, here no time is fixed, but the performance is made to depend on a contingency, namely, the death of the defendant's father during the lifetime of the contracting parties. It is true that in every case of a personal obligation to be fulfilled at a future time, there is involved the possible contingency of the death of the party binding himself, before the time of performance arrives; but here we have a further contingency depending on the life of a third person, during which neither party can claim performance of the promise. This being so, we thought it right to take time to consider whether an action would lie before the death of the defendant's father had placed the plaintiff in a position to claim the fulfilment of the defendant's promise.

After full consideration we are of opinion that, notwithstanding the distinguishing circumstance to which I have referred, this case falls within the principle of *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q. B.) 455), and that, consequently, the present action is well brought.

The considerations on which the decision in *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q. B.) 455) is founded are that the announcement of the contracting party of his intention not to fulfil the contract amounts to a breach, and that it is for the common benefit of both parties that the contract shall be taken to be broken as to all its incidents, including non-performance at the appointed time; as by an action being brought at once, and the damages consequent on non-performance being assessed at the earliest moment, many of the injurious effects of such non-performance may possibly be averted or mitigated.

It is true, as is pointed out by the Lord Chief Baron, in his judgment in this case, that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is—and the decision in *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q. B.) 455) proceeds on that assumption—a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the

time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly.

The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract ; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote.

It is obvious that such a course must lead to the convenience of both parties ; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-fulfilment of the contract ; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished.

It appears to us that the foregoing considerations apply to the case of a contract the performance of which is made to depend on a contingency, as much as to one in which the performance is to take place at a future time ; and we are, therefore, of opinion that the principle of the decision of *Hochster* v. *De la Tour*

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(2 E. & B. 678; 22 L. J. (Q.B.) 455) is equally applicable to such a case as the present.

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It is next to be observed, that the law as settled by *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q.B.) 455) and *Danube and Black Sea Company* v. *Xenos* (13 C. B. (N.S.) 825; 31 L. J. (C.P.) 284) is obviously quite as applicable to a contract in which personal status or personal rights are involved, as to one relating to commercial or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed in futuro. On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status, that of betrothment, at once arises between the parties. This relation, it is true, has not, by the law of England, the same important consequences which attached to it by the canon law and the law of many other countries. Nevertheless, it carries with it consequences of the utmost importance to the parties. Each becomes bound to the other; neither can, consistently with such a relation, enter into a similar engagement with another person; each has an implied right to have this relation continued till the contract is finally accomplished by marriage. To the woman, more especially, it is all-important that the relation shall not be put an end to. Independently of the mental pain occasioned by the abrupt termination of such an engagement, the fact of its existence, if followed by such a termination, must necessarily operate to her serious disadvantage. During its continuance others will naturally be deterred from approaching her with matrimonial intentions; nor could she admit of such approaches, if made; while the breaking off of the engagement is too apt to cast a slur upon one who has been thus treated. We see, therefore, every reason for applying the principle of *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q.B.) 455) to such a case, and for holding the contract, if repudiated, to be broken, not only in its present, but also in its ultimate obligations and consequences. To hold that the aggrieved party must wait till the time fixed for marrying shall have arrived, or the event on which it is to depend shall have happened, would have the effect of

aggravating the injury, by preventing the party from forming any other union, and by reason of advancing age rendering the probability of such a union constantly less. It has been suggested, indeed, that the desire of marrying and the happiness to be expected from it diminish with advancing years, and, therefore, that when by the terms of the contract marriage is only to take place at a remote time, the value of the marriage and the damages to be recovered for a breach of the promise would be less if the refusal were made when the time for marrying was accomplished; and that, consequently, an action ought not to be allowed till the time when the fulfilment of the contract could have been claimed. We cannot concur in this view. We think that, in estimating the amount of injury done and of the compensation to be made for it, if the contract were broken when the time for marrying had arrived, the wasted years and the impossibility of forming any other engagement during the intermediate time should be taken into account, and not merely the age of the parties and the then existing value of the marriage. It is, therefore, manifest that it is better for both parties—for the party intending to break the contract, as well as for the party wronged by the breach of it—that an express repudiation of the contract should be treated as a violation of it in all its incidents, and should give the right to the party wronged to bring an action at once, and have the damages assessed at the earliest moment. No one can doubt that, morally speaking, a party who determines to break off a matrimonial engagement acts far more commendably if he at once gives notice of his intention, than if he keeps that intention secret till the time for fulfilling the promise has come. The reason is, that the giving such notice at the earliest moment tends to mitigate, while the delay in giving it necessarily aggravates, the injury to the party wronged.

It has been urged that there must be great difficulty in thus assessing damages prospectively. But this must always be more or less the case whenever the principle of *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q.B.) 455) comes to be applied. It would equally exist where one of the parties, by marrying another person, gave rise, as in the case of *Short* v. *Stone* (8 Q. B. 358), to an immediate right of action. It cannot be said that the difficulty is by any means insuperable, and the advantages resulting from

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the application of the principle of *Hochster* v. *De la Tour* (2 E. & B. 678 ; 22 L. J. (Q.B.) 455) are quite sufficient to outweigh any inconvenience arising from the difficulty of assessing the damages.

We are struck by the fact that the Lord Chief Baron, while holding that the present action would not lie, expressed an opinion that the wrong done by the repudiation of a contract of marriage might be made the foundation of an action on the case, in which the facts should be set forth. But as the rights and obligations of the parties arise here entirely out of the contract, we have a difficulty in seeing how such an action could be maintained. But be that as it may, as in such an action as is thus suggested the damages would have to be ascertained with reference to the same facts and the same considerations as in an action brought on the contract, it seems to us by far the simpler course, the case being, as it seems to us for the reasons we have given, clearly within the decision in *Hochster* v. *De la Tour* (2 E. & B. 678 ; 22 L. J. (Q.B.) 455), to hold that the present action for breach of the contract may be maintained, and that in it the plaintiff is entitled to recover damages in respect of the non-fulfilment of the promise as though the death of the defendant's father—the event on which the fulfilment was to depend—had actually occurred.

We are therefore of opinion that the judgment of the Court of Exchequer must be reversed.

BYLES, J., delivered judgment to the same effect.

Judgment reversed.

BETTINI v. GYE.

'A party to a contract who has performed, or is ready and willing to perform, his obligations under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law it has been recognized that such obligations are not all of equal importance. There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand, there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the sub-

stance of the contract. Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract.'—Per Fletcher Moulton, L.J., in *Wallis Son & Wells* v. *Pratt & Haynes* [1910] 2 K. B. at p. 1012.

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Third count, that the defendant was and is the director of the Royal Italian Opera in London, and the plaintiff was and is a dramatic artist and professional singer, and thereupon it was agreed by and between the plaintiff and the defendant in parts beyond the seas, to wit, at Milan, in Italy, by an agreement in writing in the French language, of which the translation is as follows:—

'Royal Italian Opera,
'Covent Garden, London.

'Year 1875.

'The undersigned, Mr. Frederick Gye, gentleman, and director of the Royal Italian Opera in London, of the one part, and Mr. Bettini, dramatic artist, on the other part, have agreed as follows:

'1. Mr. Bettini undertakes to fill the part of primo tenor assoluto in the theatres, halls, and drawing rooms, both public and private, in Great Britain and in Ireland during the period of his engagement with Mr. Gye.

'2. This engagement shall begin on the 30th of March, 1875, and shall terminate on the 13th of July, 1875.

'3. The salary of Mr. Bettini shall be 150*l.* per month, to be paid monthly.

'4. Mr. Bettini shall sing in concerts as well as in operas, but he shall not sing anywhere out of the theatre in the United Kingdom of Great Britain and Ireland from the 1st of January to the 31st of December, 1875, without the written permission of Mr. Gye, except at a distance of more than fifty miles from London, and out of the season of the theatre.

'5. Mr. Gye shall furnish the costumes to Mr. Bettini for his characters according to the ordinary usage of theatres.

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'6. Mr. Bettini will conform to the ordinary rules of the theatre in case of sickness, fire, rehearsals, &c.

'7. Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals.

'8. In case Mr. Gye shall require the services of Mr. Bettini at a distance of more than ten miles from London, he shall pay his travelling expenses.

'9. Mr. Bettini shall not be obliged to sing more than four times a week in opera. Mr. Bettini, in order to assist the direction of Mr. Gye, will sing, upon the request of Mr. Gye, in the same characters in which he has already sung, and in other characters of equal position. In case of the sickness of other artists, Mr. Bettini agrees to replace them in their characters of first tenor assoluto.

'10. Mr. Gye shall have the right to prolong the period limited above upon the same conditions, provided that the period does not go beyond the end of the month of August.

'F. Gye,
'Milan, 14 Dec. 1874.'

That the plaintiff did not sing anywhere out of the said theatre in the United Kingdom of Great Britain and Ireland, from the 1st of January, 1875, to the date of the commencement of this action, without the written permission of the defendant, except at a distance of more than fifty miles from London, and out of the season of the said theatre. That the plaintiff was prevented by temporary illness from being in London before the 28th of March, 1875, but he did arrive in London on that day; and, save as aforesaid, the plaintiff has always performed his said agreement, and was and is ready and willing to perform his part of the said agreement, of all which the defendant had notice, and all things were done and happened, and all conditions were fulfilled and all times elapsed necessary to entitle the plaintiff to a performance by the defendant of the said agreement and to maintain this action. Yet the defendant did not nor would receive the plaintiff into his said service, but wholly refused so to do, and wrongfully exonerated and discharged the plaintiff from his said agreement, and from the performance of the said agreement on the plaintiff's

part, and wrongfully put an end to and determined the said agreement, whereby the plaintiff was damnified.

The defendant pleaded, ninthly, to the third count, that the plaintiff was not in London six days before the commencement of the said engagement for the purpose of rehearsals, nor had the defendant notice before the said six days of the plaintiff's inability to be in London, or that he would not be in London six days before the commencement of his said engagement for the purpose of rehearsals, nor was the plaintiff ready and willing to attend such rehearsals, although it was necessary for him to do so, wherefore the defendant did not nor would receive the plaintiff into his service in the capacity and on the terms aforesaid, which is the breach complained of.

Demurrer to the ninth plea, and joinder.

The judgment of the Court (BLACKBURN, QUAIN, and ARCHIBALD, JJ.) was delivered by

BLACKBURN, J.—In this case the parties have entered into an agreement in writing, which is set out on the record.

The Court must ascertain the intention of the parties, as is said by Parke, B., in delivering the judgment of the Court in *Graves* v. *Legg* (9 Ex. at p. 716 ; 23 L. J. (Ex.) 228), ' to be collected from the instrument and the circumstances legally admissible in evidence with reference to which it is to be construed.' He adds : ' One particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract.' There was no averment of any special circumstances existing in this case, with reference to which the agreement was made, but the Court must look at the general nature of such an engagement. By the 7th paragraph of the agreement, ' Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement for the purpose of rehearsals.' The engagement was to begin on the 30th of March, 1875. It is admitted on the record that the plaintiff did not arrive in London till the 28th of March, which is less than six days before the 30th, and therefore it is clear that he has not fulfilled this part of the contract.

The question raised by the demurrer is, not whether the

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plaintiff has any excuse for failing to fulfil this part of his contract, which may prevent his being liable in damages for not doing so, but whether his failure to do so justified the defendant in refusing to proceed with the engagement, and fulfil his, the defendant's part. And the answer to that question depends on whether this part of the contract is a condition precedent to the defendant's liability, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages.

This is a question which has very often been raised; and the numerous cases on the subject are collected in the first volume of Sir E. V. Williams' Notes to Saunders, p. 554, in the notes to *Pordage* v. *Cole*, and in the second volume, p. 742, notes to *Peeters* v. *Opie*.

We think the answer to this question depends on the true construction of the contract taken as a whole.

Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and primâ facie a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent.

In this case, if to the 7th paragraph of the agreement there had been added words to this effect: 'And if Mr. Bettini is not there at the stipulated time Mr. Gye may refuse to proceed further with the agreement;' or if, on the other hand, it had been said, 'And if not there, Mr. Gye may postpone the commencement of Mr. Bettini's engagement for as many days as Mr. Bettini makes default, and he shall forfeit twice his salary for that time,' there could have been no question raised in the case. But there is no such declaration of the intention of the parties either way. And in the absence of such an express declaration, we think that we are to look to the whole contract, and applying the rule stated by Parke, B., to be acknowledged (in *Graves* v. *Legg*, 9 Ex. at p. 716; 23 L. J. (Ex.) 228), see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would

render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent.

If the plaintiff's engagement had been only to sing in operas at the theatre, it might very well be that previous attendance at rehearsals with the actors in company with whom he was to perform was essential. And if the engagement had been only for a few performances, or for a short time, it would afford a strong argument that attendance for the purpose of rehearsals during the six days immediately before the commencement of the engagement was a vital part of the agreement. But we find, on looking to the agreement, that the plaintiff was to sing in theatres, halls, and drawing-rooms, both public and private, from the 30th of March to the 13th of July, 1875, and that he was to sing in concerts as well as in operas, and was not to sing anywhere out of the theatre in Great Britain or Ireland from the 1st of January to the 31st of December, 1875, without the written permission of the defendant, except at a distance of more than fifty miles from London.

The plaintiff, therefore, has, in consequence of this agreement, been deprived of the power of earning anything in London from the 1st of January to the 30th of March; and though the defendant has, perhaps, not received any benefit from this, so as to preclude him from any longer treating as a condition precedent what had originally been one, we think this at least affords a strong argument for saying that subsequent stipulations are not intended to be conditions precedent, unless the nature of the thing strongly shews they must be so.

And, as far as we can see, the failure to attend at rehearsals during the six days immediately before the 30th of March could only affect the theatrical performances and, perhaps, the singing in duets or concerted pieces during the first week or fortnight of this engagement, which is to sing in theatres, halls, and drawing-rooms, and concerts for fifteen weeks.

We think, therefore, that it does not go to the root of the matter so as to require us to consider it a condition precedent.

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The defendant must, therefore, we think, seek redress by a cross-claim for damages.

Judgment must be given for the plaintiff.

Judgment for the plaintiff.

FREETH v. BURR.

'The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct." '—Per Lord Blackburn in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884) 9 App. Cas. at p. 443.

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The declaration stated that it was agreed by and between the plaintiffs and the defendant that the defendant should sell and deliver to the plaintiffs and the plaintiffs should buy and accept of and from the defendant 250 tons of pig-iron, at 56*s.* per ton, to be delivered by the defendant to the plaintiffs; that the defendant delivered to the plaintiffs one half of the said 250 tons of pig-iron, and that all conditions were fulfilled, &c., to entitle the plaintiffs to have the agreement fulfilled by the defendant in respect of the matters the breach of which is hereinafter assigned, and to maintain this action: Breach, that the defendant did not nor would deliver to the plaintiffs the residue of the said 250 tons of pig-iron according to the agreement; whereby the plaintiffs had been deprived of the profits which would have accrued to them from the delivery of the same, and had been delayed and otherwise injured and damnified in their business, in which the defendant well knew they intended to use the said goods. Claim, 500*l.*

Pleas, 1. that the defendant did not agree, as alleged; 2. a denial of the alleged breach; 3. that, after the alleged promise, and before any breach thereof by the defendant, the plaintiffs exonerated and discharged the defendant from his promise and from the performance of the same; 4. that, after the making of

the alleged contract, and before any breach thereof by him, the said contract was rescinded and abandoned by mutual assent.

Joinder of issue; and further replication to the third plea, that the plaintiffs were suing, not for a breach of the agreement therein admitted, and from the performance of which the defendant alleged that the plaintiffs exonerated and discharged the defendant, but for the breach of another and subsequent agreement by which the defendant agreed to sell and deliver the said iron to the plaintiffs.

There was a similar replication to the fourth plea.

Rejoinders to the second and third replications,—that no such agreement as the supposed other and subsequent agreements in those replications respectively mentioned were made,—that the defendant denied the alleged breaches of the said other and subsequent agreements and every of them, and said that he was not guilty thereof. Issue.

The cause was tried before Brett, J., at the sittings in London after last Hilary Term. The plaintiffs and the defendant were iron-merchants and manufacturers. In November, 1871, the plaintiffs agreed to buy of the defendant 250 tons of pig-iron, and on the 28th of that month bought and sold-notes were exchanged. The bought-note, signed by the plaintiffs, was as follows:—

'London, 28th November, 1871.

'Bought of Messrs. D. M. Burr & Co. two hundred and fifty tons of pig-iron, at fifty-six shillings per ton alongside our wharf, Millwall. Half to be delivered in two weeks, remainder in four weeks. Payment, net cash 14 days after delivery of each parcel.'

The market was rising, and early in February the plaintiffs wrote to the defendant remonstrating with him for not having delivered any of the iron. About the 15th of that month 10½ tons were sent alongside the plaintiffs' wharf; and on the 20th the plaintiffs wrote to the defendant, as follows:—

'We are much surprised you should have sent such a paltry lot as 10 tons on account of contract for 250 tons which should have been delivered last December. We must request you will give us a definite time for delivery of at least 50 tons, which must be delivered at once, or we shall have again to buy against you.'

On the 17th of May, 1872, the defendant wrote to the plaintiffs, as follows:—

'We are informed that the lighter which we sent with 30 tons

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Kentledge pig-iron to your wharf on the 10th instant is still lying there unloaded, and that this has arisen through an undue preference being allowed by you to other barges in discharging, or from some other cause for which you are to blame. We have, therefore, to intimate that we shall hold you liable for demurrage from and after 13th intant.'

On the 18th the plaintiffs wrote to the defendant,—'In answer to yours of the 17th instant, your barge has been discharged some days. Do you intend to deliver the remainder, or shall we buy against you?'

To this the defendant replied on the 21st,—'It is our intention to deliver remainder of pig-iron, and do not wish you to buy against us. We inclose invoice of last lot.'

On the 29th of May, 126 tons in all having by that time been delivered, the defendant wrote to the plaintiffs,—'Would you kindly forward us cheque in payment of the ballast iron we have delivered to you, and we shall proceed at once to send on the remainder.'

The plaintiffs, under an erroneous impression that they were entitled to set off against the defendant's claim any loss which they might incur in case the defendant should fail to deliver the remainder of the iron contracted for, refused to pay for the 125 or 126 tons which had been delivered; and their attorney, in reply to a letter from the defendant's attorney demanding payment, put forward a claim for 250*l.*, being 2*l.* per ton on the 125 tons undelivered.

On the 12th of June, the defendant's attorneys wrote to the plaintiffs' attorney,—'We hardly think it necessary to refer to your clients' claim for 250*l.*, as it is purely hypothetical and could not possibly arise, as your clients by their own default have obliged our client to refuse to make any further delivery of iron. We must request your clients' immediate attention to the settlement of amount (352*l.* 15*s.* 10*d.*) mentioned in our letter of the 5th instant.'

The plaintiffs paid ultimately (but not until after an action had been brought for it) for the first 125 tons of iron; and this action was brought against the defendant for the breach of his contract in refusing to deliver the second 125 tons.

On the part of the defendant, it was contended that the plain

tiff's refusal to pay for the first parcel of the iron amounted to an abandonment of the contract by them, and absolved the defendant from his obligation further to perform it on his part. *Hoare* v. *Rennie* (5 H. & N. 19 ; 29 L. J. (Ex.) 19) was relied on.

The learned judge ruled that the mere refusal by the plaintiffs to pay for the first 125 tons did not exonerate the defendant from his obligation under the contract to deliver the second 125 tons, and consequently that the plaintiffs were entitled to recover such damages as they had sustained from the non-delivery : and he directed a verdict to be entered for the plaintiffs for 148*l.* 16*s.*,— reserving leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that the refusal by the plaintiffs to pay for the iron delivered amounted to an abandonment of the contract.

[A rule nisi was obtained accordingly.]

Lord Coleridge, C.J.—The question in this case arises upon a contract for the sale of iron entered into between the plaintiffs and the defendant on the 28th of November, 1871, in the following terms :—' Bought of Messrs. D. M. Burr & Co. 250 tons of pig-iron, at 56*s.* per ton alongside our wharf, Millwall. Half to be delivered in two weeks, remainder in four weeks. Payment, net cash fourteen days after delivery of each parcel.' The material facts were these :—There was no delivery in the terms of the contract of either parcel of the iron. In point of fact, the delivery of the first 125 tons was by mutual arrangement delayed, and the last delivery of that parcel did not take place until the 12th of May, 1872. There was a correspondence between the parties, pressure by the purchasers for delivery, and excuses by the vendor for the non-delivery. That the former were anxious for the completion of the contract appears to be clear, as well from the tenor of the correspondence as from the fact that the market was rising. A few days after the full delivery of the first parcel, viz. on the 29th of May, 1872, the defendant demanded payment for the 125 tons, which the plaintiffs refused, claiming to set off damages for the defendant's breach of contract. The plaintiffs afterwards demanded delivery of the remaining 125 tons ; and upon the defendant's refusal to comply with that demand this action was brought. The question is whether the fact of the plaintiffs' refusal to pay for the 125 tons delivered was such a

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refusal on the part of the purchasers to comply with their part of the contract as to set the seller free and to justify his refusal to continue to perform it. This certainly appears, viz. that there was an extension by mutual consent of the time for the delivery of the iron from December, 1871, to May, 1872, with constant pressure on the one side and excuses and resistance on the other. I mention that because it is important to express my view that, in cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz. that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free. That is the true principle on which *Hoare* v. *Rennie* (5 H. & N. 19 ; 29 L. J. (Ex.) 19) was decided, whether rightly or not upon the facts, I will not presume to say. Where by the non-delivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract. That is the ground upon which it is said in *Jonasshon* v. *Young* (4 B. & S. 296 ; 32 L. J. (Q. B.) 385) that that case may be supported. In *Withers* v. *Reynolds* (2 B. & Ad. 882) there was an express refusal by the plaintiff to perform the contract : and Patteson, J., says : ' If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw : but the plaintiff here expressly refuses to pay for the loads as delivered ; the defendant, therefore, is not liable for ceasing to perform his part of the contract.' Wightman, J., certainly, and Crompton, J., by inference, in *Jonasshon* v. *Young* (4 B. & S. at p. 299), both uphold that case upon the principle on which I rely. The principle to be applied in these cases is,

whether the non-delivery or the non-payment amounts to an abandonment of the contract or a refusal to perform it on the part of the person so making default. That being so, and my Brother Brett having ruled that the mere non-payment for the first portion of the iron contracted for, unattended by any other act on the part of the purchasers, did not put an end to the contract so as to disentitle the purchasers to maintain an action for the non-delivery of the second portion, but only gave the seller a remedy by cross-action (of which he has availed himself), I am of opinion that his ruling was correct, and that the rule should be discharged.

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KEATING and DENMAN, JJ., delivered judgments to the same effect.

Rule discharged.

'The plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shewn that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract.'—Per Blackburn, J., in *Appleby* v. *Myers* (1867) L. R. 2 C. P. at p. 661.

SUMPTER v. HEDGES.

SUMPTER *v.* HEDGES [1898] 1 Q.B. 673

Appeal from the judgment of Bruce J. at the trial before him without a jury.

The action was for work done and materials provided. The plaintiff, a builder, had contracted with the defendant to build upon the defendant's land two houses and stables for the sum of 565*l.* The plaintiff did part of the work, amounting in value to about 333*l.*, and had received payment of part of the price. He then informed the defendant that he had no money, and could not go on with the work. The learned judge found that he had abandoned the contract. The defendant thereupon finished the buildings on his own account, using for that purpose certain building materials which the plaintiff had left on the ground. The judge gave judgment for the plaintiff for the value of the materials so used, but allowed him nothing in respect of the work which he had done upon the buildings.

A. L. SMITH, L.J.—In this case the plaintiff, a builder, entered into a contract to build two houses and stables on the defendant's

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land for a lump sum. When the buildings were still in an unfinished state the plaintiff informed the defendant that he had no money, and was not going on with the work any more. The learned judge has found as a fact that he abandoned the contract. Under such circumstances, what is a building owner to do? He cannot keep the buildings on his land in an unfinished state for ever. The law is that, where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be recovered. Therefore the plaintiff could not recover on the original contract. It is suggested however that the plaintiff was entitled to recover for the work he did on a quantum meruit. But, in order that that may be so, there must be evidence of a fresh contract to pay for the work already done. With regard to that, the case of *Munro* v. *Butt* (8 E. & B. 738) appears to be exactly in point. That case decides that, unless the building owner does something from which a new contract can be inferred to pay for the work already done, the plaintiff in such a case as this cannot recover on a quantum meruit. In the case of *Lysaght* v. *Pearson*,[1] to which we have been referred, the case of *Munro* v. *Butt* (8 E. & B. 738) does not appear to have been referred to. There the plaintiff had contracted to erect on the defendant's land two corrugated iron roofs. When he had completed one of them, he does not seem to have said that he abandoned the contract, but merely that he would not go on unless the defendant paid him for what he had already done. The defendant thereupon proceeded to erect for himself the second roof. The Court of Appeal held that there was in that case something from which a new contract might be inferred to pay for the work done by the plaintiff. That is not this case. In the case of *Whitaker* v. *Dunn* (3 Times L. R. 602) there was a contract to erect a laundry on defendant's land, and the laundry erected was not in accordance with the contract, but the official referee held that the plaintiff could recover on a quantum meruit. The case came before a Divisional Court, consisting of Lord Coleridge C.J. and myself, and we said that the decision in *Munro* v. *Butt* (8 E. & B. 738) applied, and there being no circumstances to justify an inference of a fresh contract the plaintiff must fail. My brother Collins thinks that that case went to the Court of Appeal, and that he

[1] Not reported, except in *Times* Newspaper of March 3, 1879.

argued it there, and the Court affirmed the decision of the Queen's Bench Division. I think the appeal must be dismissed.

COLLINS, L.J.—I agree. I think the case is really concluded by the finding of the learned judge to the effect that the plaintiff had abandoned the contract. If the plaintiff had merely broken his contract in some way so as not to give the defendant the right to treat him as having abandoned the contract, and the defendant had then proceeded to finish the work himself, the plaintiff might perhaps have been entitled to sue on a quantum meruit on the ground that the defendant had taken the benefit of the work done. But that is not the present case. There are cases in which, though the plaintiff has abandoned the performance of a contract, it is possible for him to raise the inference of a new contract to pay for the work done on a quantum meruit from the defendant's having taken the benefit of that work, but, in order that that may be done, the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done. It is only where the circumstances are such as to give that option that there is any evidence on which to ground the inference of a new contract. Where, as in the case of work done on land, the circumstances are such as to give the defendant no option whether he will take the benefit of the work or not, then one must look to other facts than the mere taking the benefit of the work in order to ground the inference of a new contract. In this case I see no other facts on which such an inference can be founded. The mere fact that a defendant is in possession of what he cannot help keeping, or even has done work upon it, affords no ground for such an inference. He is not bound to keep unfinished a building which in an incomplete state would be a nuisance on his land. I am therefore of opinion that the plaintiff was not entitled to recover for the work which he had done. I feel clear that the case of *Whitaker* v. *Dunn* (3 Times L. R. 602), to which reference has been made, was the case which as counsel I argued in the Court of Appeal, and in which the Court dismissed the appeal on the ground that the case was concluded by *Munro* v. *Butt* (8 E. & B. 738).

CHITTY, L.J., delivered judgment to the same effect.

Appeal dismissed.

TAYLOR v. CALDWELL.

'It is, I think, important to bear in mind the principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible, or otherwise frustrates the objects which the parties to the contract have in view. This principle is one of contract law, depending on some term or condition to be implied in the contract itself and not on something entirely dehors the contract which brings the contract to an end. It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing, therefore, in every case is to compare the term or condition which it is sought to imply with the express provisions of the contract, and with the intention of the parties as gathered from those provisions, and ascertain whether there is any such inconsistency.

'Again, in determining whether any such term or condition can be properly implied, the nature of the contract is of considerable materiality. If, for example, the contract be for the hire of a particular horse on a particular day, it would be easy to imply a condition that the horse should still be living on the day in question. If, however, the contract were for the hire of a horse generally, it would be difficult, if not impossible, to imply a term relieving the hirer from liability, if his only horse died before the day arrived.

'Moreover, some conditions can be more readily implied than others. Speaking generally, it seems to me easier to imply a condition precedent defeating a contract before its execution has commenced than a condition subsequent defeating the contract when it is part performed. A contract under which A. is to have the use of B.'s horse for two days' hunting might well be defeated by the death of the horse before the two days commenced. It would be easy to imply a condition precedent to that effect. But the case would be very different if the horse died at the end of the first day, and it was sought to imply a condition subsequent relieving A. in that event of liability to pay the sum agreed for the hire.

'The simplest cases of the application of the principle are, no doubt, those of contracts de certo corpore, as in *Taylor* v. *Caldwell* (3 B. & S. 826). Here there was an agreement by A. to allow B. the use of his music-hall on certain specified days, and the music-hall was burnt down before the first of those days arrived. A condition precedent could easily be implied. A similar case is that of *Appleby* v. *Myers* (L. R. 2 C. P. 651). Here A. contracted to erect machinery in buildings belonging to B., and the buildings were burnt down before th work was finished. It was not difficult to imply a condition subsequent.

'But the principle applies also to cases where the existence or continued

existence of some specific thing is in no way involved, and in such cases its application is not so easy. It applies, for instance, to contracts of service which, from some causes not contemplated by the contract itself, have become impossible of fulfilment. A good instance of this may be found in the recent decision of your Lordships' House in *Horlock* v. *Beal* ([1916] 1 A. C. 486). It applies also to charterparties where some commercial adventure contemplated by the parties, and in the fulfilment of which both are interested, is brought to an end by the happening of some event for which neither is to blame. The leading case on this branch of the law is *Jackson* v. *Union Marine Insurance Co.* (L. R. 10 C. P. 125, 141).'—Per Lord Parker in *F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited* [1916] 2 A. C. at p. 422.

TAYLOR v. CALDWELL (1863) 3 B. & S. 826

THE judgment of the Court (COCKBURN, C.J., WIGHTMAN, CROMPTON, and BLACKBURN, JJ.) was delivered by

BLACKBURN, J.—In this case the plaintiffs and defendants had, on the 27th May, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of The Surrey Gardens and Music Hall on four days then to come, viz., the 17th June, 15th July, 5th August and 19th August, for the purpose of giving a series of four grand concerts, and day and night fêtes at the Gardens and Hall on those days respectively; and the plaintiffs agreed to take the Gardens and Hall on those days, and pay 100l. for each day.

The parties inaccurately call this a 'letting,' and the money to be paid a 'rent;' but the whole agreement is such as to shew that the defendants were to retain the possession of the Hall and Gardens so that there was to be no demise of them, and that the contract was merely to give the plaintiffs the use of them on those days. Nothing however, in our opinion, depends on this. The agreement then proceeds to set out various stipulations between the parties as to what each was to supply for these concerts and entertainments, and as to the manner in which they should be carried on. The effect of the whole is to shew that the existence of the Music Hall in the Surrey Gardens in a state fit for a concert was essential for the fulfilment of the contract,—such entertainments as the parties contemplated in their agreement could not be given without it.

After the making of the agreement, and before the first day on

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which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence the concerts could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract.

There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible. The law is so laid down in 1 Roll. Abr. 450, Condition (G), and in the note (2) to *Walton* v. *Waterhouse* (2 Wms. Saund. 421 a. 6th ed.), and is recognised as the general rule by all the Judges in the much discussed case of *Hall* v. *Wright* (E. B. & E. 746). But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied : and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done ; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would,

if it were brought to their minds, say that there should be such a condition.

Accordingly, in the Civil law, such an exception is implied in every obligation of the class which they call obligatio de certo corpore. The rule is laid down in the Digest, lib. XLV., tit. 1, de verborum obligationibus, l. 33. 'Si Stichus certo die dari promissus, ante diem moriatur: non tenetur promissor.' The principle is more fully developed in l. 23. 'Si ex legati causa, aut ex stipulatu hominem certum mihi debeas: non aliter post mortem eius tenearis mihi, quam si per te steterit, quominus vivo eo eum mihi dares: quod ita fit, si aut interpellatus non dedisti, aut occidisti eum.' The examples are of contracts respecting a slave, which was the common illustration of a certain subject used by the Roman lawyers, just as we are apt to take a horse; and no doubt the propriety, one might almost say necessity, of the implied condition is more obvious when the contract relates to a living animal, whether man or brute, than when it relates to some inanimate thing (such as in the present case a theatre) the existence of which is not so obviously precarious as that of the live animal, but the principle is adopted in the Civil law as applicable to every obligation of which the subject is a certain thing. The general subject is treated of by Pothier, who in his Traité des Obligations, partie 3, chap. 6, art. 3, § 668 states the result to be that the debtor corporis certi is freed from his obligation when the thing has perished, neither by his act, nor his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred.

Although the Civil law is not of itself authority in an English Court, it affords great assistance in investigating the principles on which the law is grounded. And it seems to us that the common law authorities establish that in such a contract the same condition of the continued existence of the thing is implied by English law.

There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, e. g. promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and therefore in such cases the contract is in terms broken if the promisor dies before fulfil-

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ment. Yet it was very early determined that, if the performance is personal, the executors are not liable; *Hyde* v. *The Dean of Windsor* (Cro. Eliz. 552, 553). See 2 Wms. Exors. 1560, 5th ed. where a very apt illustration is given. 'Thus,' says the learned author, 'if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract: for the undertaking is merely personal in its nature, and, by the intervention of the contractor's death, has become impossible to be performed.' For this he cites a dictum of Lord Lyndhurst in *Marshall* v. *Broadhurst* (1 Tyr. 348, 349), and a case mentioned by Patteson J. in *Wentworth* v. *Cock* (10 A. & E. 42, 45–46). In *Hall* v. *Wright* (E. B. & E. 746, 749), Crompton J., in his judgment, puts another case. 'Where a contract depends upon personal skill, and the act of God renders it impossible, as, for instance, in the case of a painter employed to paint a picture who is struck blind, it may be that the performance might be excused.'[1]

It seems that in those cases the only ground on which the parties or their executors can be excused from the consequences of the breach of the contract is, that from the nature of the contract there is an implied condition of the continued existence of the life of the contractor, and, perhaps, in the case of the painter of his eyesight. In the instances just given, the person, the continued existence of whose life is necessary to the fulfilment of the contract, is himself the contractor, but that does not seem in itself to be necessary to the application of the principle; as is illustrated by the following example. In the ordinary form of an apprentice deed the apprentice binds himself in unqualified terms to 'serve until the full end and term of seven years to be fully complete and ended,' during which term it is covenanted that the apprentice his master 'faithfully shall serve,' and the father of the apprentice in equally unqualified terms binds himself for the performance by the apprentice of all and every covenant on his part. (See the form, 2 Chitty on Pleading, 370, 7th ed. by Greening.) It is undeniable that if the apprentice dies within the seven years, the covenant of the father that he shall perform his covenant to serve for seven years is not fulfilled, yet surely it cannot be that an action would lie against the father? Yet

[1] See *Robinson* v. *Davison* (1871) L. R. 6 Ex. 269. [Edd.]

the only reason why it would not is that he is excused because of the apprentice's death.

These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. For example, where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day; there, if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price and the vendor is excused from performing his contract to deliver, which has thus become impossible.

That this is the rule of the English law is established by the case of *Rugg* v. *Minett* (11 East, 210), where the article that perished before delivery was turpentine, and it was decided that the vendor was bound to refund the price of all those lots in which the property had not passed; but was entitled to retain without deduction the price of those lots in which the property had passed, though they were not delivered, and though in the conditions of sale, which are set out in the report, there was no express qualification of the promise to deliver on payment. It seems in that case rather to have been taken for granted than decided that the destruction of the thing sold before delivery excused the vendor from fulfilling his contract to deliver on payment.

This also is the rule in the Civil law, and it is worth noticing that Pothier, in his celebrated Traité du Contrat de Vente (see Part. 4, § 307, &c.; and Part. 2, ch. 1, sect. 1, art. 4, § 1), treats this as merely an example of the more general rule that every obligation de certo corpore is extinguished when the thing ceases to exist. See Blackburn on the Contract of Sale, p. 173.

The same principle seems to be involved in the decision of *Sparrow* v. *Sowgate* (W. Jones, 29), where, to an action of debt on an obligation by bail, conditioned for the payment of the debt or the render of the debtor, it was held a good plea that before any default in rendering him the principal debtor died. It is true that was the case of a bond with a condition, and a distinction is sometimes made in this respect between a condition and a contract. But this observation does not apply to *Williams* v. *Lloyd* (W. Jones, 179). In that case the count, which was in

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assumpsit, alleged that the plaintiff had delivered a horse to the defendant, who promised to redeliver it on request. Breach, that though requested to redeliver the horse he refused. Plea, that the horse was sick and died, and the plaintiff made the request after its death ; and on demurrer it was held a good plea, as the bailee was discharged from his promise by the death of the horse without default or negligence on the part of the defendant. 'Let it be admitted,' say the Court, 'that he promised to deliver it on request, if the horse die before, that is become impossible by the act of God, so the party shall be discharged, as much as if an obligation were made conditioned to deliver the horse on request, and he died before it.' And Jones, adds the report, cited 22 Ass. 41, in which it was held that a ferryman who had promised to carry a horse safe across the ferry was held chargeable for the drowning of the animal only because he had overloaded the boat, and it was agreed that notwithstanding the promise no action would have lain had there been no neglect or default on his part.

It may, we think, be safely asserted to be now English law, that in all contracts of loan of chattels or bailments, if the performance of the promise of the borrower or bailee to return the things lent or bailed becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel.

The great case of *Coggs* v. *Bernard* (1 Smith's L. C. 171, 5th ed. ; 2 L. Raym. 909) is now the leading case on the law of bailments, and Lord Holt, in that case, referred so much to the Civil law that it might perhaps be thought that this principle was there derived direct from the civilians, and was not generally applicable in English law except in the case of bailments ; but the case of *Williams* v. *Lloyd* (W. Jones, 179), above cited, shews that the same law had been already adopted by the English law as early as The Book of Assizes. The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance.

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We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the Gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things. Consequently the rule must be absolute to enter the verdict for the defendants.

Rule absolute.

'The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from the presumed common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract. The term to be implied must not be inconsistent with any express term of the contract.'—Per Russell, J., *in re Badische Company, Limited* [1921] 2 Ch. at p. 379.

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JACKSON *v.* THE UNION MARINE INSURANCE COMPANY LIMITED
(1874) L. R. 10 C. P. 125

The following statement of the facts is taken from the dissenting judgment of CLEASBY, B.:—

The question in this case was, whether there was a total loss by perils of the sea of the freight to be earned under a charterparty.

By the charterparty, the vessel *Spirit of the Dawn* was to

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proceed from Liverpool to Newport, and there take on board and carry to San Francisco a cargo of iron rails.

The vessel sailed from Liverpool on the 2nd of January, 1872, got aground on the 3rd upon the rocks in Carnarvon Bay, was got off and taken to a place of safety on the 18th of February, then taken to Holyhead, and afterwards to Liverpool, where she was sold by auction on the 13th of June for 5300*l.* The purchasers repaired her; and it was proved that, on the 15th of August, it would take about a fortnight more to complete the repairs. But, in the meantime, after the vessel got on the rocks, and as soon as it was plain that some time would be required for her repairs, attempts had been made by the charterers to come to some arrangement with the plaintiff for taking up another ship to forward the rails, which were wanted for the construction of a railway. The plaintiff refused to release the charterers from their contract; and on the 16th of February the charterers chartered another ship, by which they forwarded the rails.

Under the circumstances, the plaintiff, who had effected an insurance for 1500*l.* on chartered freight valued at 2900*l.* upon the voyage from Liverpool to Newport, and thence to San Francisco, claimed for a total loss, on the ground that he was prevented by sea perils from earning the freight.

The case was tried at Liverpool before Brett, J.; and he may be considered for the purpose of the present case to have left two questions to the jury, viz. first, whether the time necessary for getting the ship off and repairing her so as to be a cargo-carrying ship, was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of the time,—and secondly, whether such time was so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowner and the charterers.

The jury found both questions in the affirmative; and the learned judge, being of opinion, notwithstanding the findings of the jury, that there was no evidence of a loss of freight by the perils insured against, directed a verdict for the defendants, reserving leave to move to enter a verdict for the plaintiff.

A motion was made, and afterwards a rule made absolute to enter a verdict for the plaintiff as for a total loss of freight.

The question upon the case on appeal is stated to be, whether

the plaintiff is entitled to have the verdict entered for him; and, if the Court is of opinion that he is so entitled, then judgment is to be entered for 1500*l.* or such sum as the Court, or an average-adjuster appointed by them, shall direct.

BRAMWELL, B.—The first question is, whether the plaintiff could have maintained an action against the charterers for not loading; for, if he could, there certainly has not been a loss of the chartered freight by any of the perils insured against.

In considering this question, the finding of the jury that 'the time necessary to get the ship off and repairing her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and charterers,' is all-important. I do not think the question could have been left in better terms; but it may be paraphrased or amplified. I understand that the jury have found that the voyage the parties contemplated had become impossible; that a voyage undertaken after the ship was sufficiently repaired would have been a different voyage, not, indeed, different as to the ports of loading and discharge, but different as a different adventure,—a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship, nor the charterers the cargo; a voyage as different as though it had been described as intended to be a spring voyage, while the one after the repair would be an autumn voyage.

It is manifest that, if a definite voyage had been contracted for, and became impossible by perils of the seas, that voyage would have been prevented and the freight to be earned thereby would have been lost by the perils of the seas. The power which undoubtedly would exist to perform, say, an autumn voyage in lieu of a spring voyage, *if both parties were willing*, would be a power to enter into a new agreement, and would no more prevent the loss of the spring voyage and its freight than would the power (which would exist if both parties were willing) to perform a voyage between different ports with a different cargo.

But the defendants say that here the contract was not to perform a definite voyage, but was at some and any future time, however distant, provided it was by no default in the shipowner, and only postponed by perils of the seas, to carry a cargo of rails

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from Newport to San Francisco; and that, no matter at what distance of time, at what loss to the shipowner, whatever might be the ship's engagements, however freights might have risen, or seamen's wages, though the voyage at the time when the ship was ready might be twice as dangerous, and possibly twice as long, from fogs, ice, and other perils, though war might have broken out meanwhile between the country to whose port she was to sail and some other, still she was bound to take and had the right to demand the cargo of the shippers; who in like way had a right to have carried and were bound to find the agreed cargo, or, if that had been sent on already, a cargo of the same description, no matter at what loss to them, and however useless the transport of the goods might be to them. This is so inconvenient, that, though fully impressed with the considerations so forcibly put by Mr. Aspland, and retaining the opinion I expressed in *Tarrabochia* v. *Hickie* (1 H. & N. 183; 29 L. J. (Ex.) 26), I think that, unless the rules of law prohibit it, we ought to hold the contrary.

The question turns on the construction and effect of the charter. By it the vessel is to sail to Newport with all possible dispatch, perils of the seas excepted. It is said this constitutes the only agreement as to time, and, provided all possible dispatch is used, it matters not when she arrives at Newport. I am of a different opinion. If this charterparty be read as a charter for a definite voyage or adventure, then it follows that there is *necessarily* an implied condition that the ship shall arrive at Newport in time for it. Thus, if a ship was chartered to go from Newport to St. Michael's in terms in time for the fruit season, and take coals out and bring fruit home, it would follow, notwithstanding the opinion expressed in *Touteng* v. *Hubbard* (3 B. & P. 291), on which I will remark afterwards, that, if she did not get to Newport in time to get to St. Michael's for the fruit season, the charterer would not be bound to load at Newport, though she had used all possible dispatch to get there, and though there was an exception of perils of the seas.

The two stipulations, to use all possible dispatch, and to arrive in time for the voyage, are not repugnant; nor is either superfluous or useless. The shipowner, in the case put, expressly agrees to use all possible dispatch: that is not a condition precedent; the sole remedy for and right consequent on the breach of it is an

action. He also impliedly agrees that the ship shall arrive in time for the voyage: that *is* a condition precedent as well as an agreement; and its non-performance not only gives the charterer a cause of action, but also releases him. Of course, if these stipulations, owing to excepted perils, are not performed, there is no cause of action, but there is the same release of the charterer. The same reasoning would apply if the terms were, to 'use all possible dispatch, and further, and as a condition precedent, to be ready at the port of loading on June 1st.' That reasoning also applies to the present case. If the charter be read, as for a voyage or adventure not precisely defined by time or otherwise, but still for a particular voyage, arrived at Newport in time for it is necessarily a condition precedent. It seems to me it must be so read. I should say reason and good sense require it. The difficulty is supposed to be that there is some rule of law to the contrary. This I cannot see; and it seems to me that, in this case, the shipowner undertook to use all possible dispatch to arrive at the port of loading, and also agreed that the ship should arrive there 'at such a time that in a commercial sense the commercial speculation entered into by the shipowner and charterers should not be at an end, but in existence.' That latter agreement is also a condition precedent. Not arriving at such a time puts an end to the contract; though, as it arises from an excepted peril, it gives no cause of action.

The same result is arrived at by what is the same argument differently put. Where no time is named for the doing of anything, the law attaches a reasonable time. Now, let us suppose this charterparty had said nothing about arriving with all possible dispatch. In that case, had the ship not arrived at Newport in a reasonable time, owing to the default of the shipowner, the charterers would have had a right of action against the owner, and would have had a right to withdraw from the contract. It is impossible to hold that, in that case, the owner would have a right to say, 'I came a year after the time I might have come, because meanwhile I have been profitably employing my ship: you must load me, and bring your action for damages.' The charterers would be discharged, because the implied condition to arrive in a reasonable time was not performed. Now, let us suppose the charter contains, as here, that the ship shall arrive

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with all possible dispatch,—I ask again, is that so inconsistent with or repugnant to a further condition that at all events she shall arrive within a reasonable time? or is that so needless a condition that it is not to be implied? I say certainly not. I must repeat the foregoing reasoning. Let us suppose them both expressed, and it will be seen they are not inconsistent nor needless. Thus, I will use all possible dispatch to get the ship to Newport, but at all events she shall arrive in a reasonable time for the adventure contemplated. I hold, therefore, that the implied condition of a reasonable time exists in this charter. Now, what is the effect of the exception of perils of the seas, and of delay being caused thereby? Suppose it was not there, and not implied, the shipowner would be subject to an action for not arriving in a reasonable time, and the charterers would be discharged. Mr. Benjamin says the exception would be implied. How that is, it is not necessary to discuss, as the words are there: but, if it is so, it is remarkable as shewing what must be implied from the necessity of the case.

The words are there. What is their effect? I think this: they excuse the shipowner, but give him no right. The charterer has no cause of action, but is released from the charter. When I say *he* is, I think *both* are. The condition precedent has not been performed, but by default of neither. It is as though the charter were conditional on peace being made between countries A. and B., and it was not; or as though the charterer agreed to load a cargo of coals, strike of pitmen excepted. If a strike of probably long duration began, he would be excused from putting the coals on board, and would have no right to call on the shipowner to wait till the strike was over. The shipowner would be excused from keeping his ship waiting, and have no right to call on the charterer to load at a future time. This seems in accordance with general principles. The exception is an excuse for him who is to do the act, and operates to save him from an action and make his non-performance not a breach of contract, but does not operate to take away the right the other party would have had, if the non-performance had been a breach of contract, to retire from the engagement: and, if one party may, so may the other. Thus, A. enters the service of B., and is ill and cannot perform his work. No action will lie against him; but B. may

hire a fresh servant, and not wait his recovery, if his illness would put an end, in a business sense, to their business engagement, and would frustrate the object of that engagement: a short illness would not suffice, if consistent with the object they had in view. So, if A. engages B. to make a drawing, say, of some present event, for an illustrated paper, and B. is attacked with blindness which will disable him for six months, it cannot be doubted that, though A. could maintain no action against B., he might procure some one else to make the drawing. So, of an engagement to write a book, and insanity of the intended author. So, of the case I have put, of an exception of a strike of pitmen.

There is, then, a condition precedent that the vessel shall arrive in a reasonable time. On failure of this, the contract is at an end and the charterers discharged, though they have no cause of action, as the failure arose from an excepted peril. The same result follows, then, whether the implied condition is treated as one that the vessel shall arrive in time for that adventure, or one that it shall arrive in a reasonable time, that time being, in time for the adventure contemplated. And in either case, as in the express cases supposed, and in the analogous cases put, non-arrival and incapacity by that time ends the contract; the principle being, that, though non-performance of a condition may be excused, it does not take away the right to rescind from him for whose benefit the condition was introduced.

On these grounds, I think that, in reason, in principle, and for the convenience of both parties, it ought to be held in this case that the charterers were, on the finding of the jury, discharged.

It remains to examine the authorities. The first in date relied on by the defendants is *Hadley* v. *Clarke* (8 T. R. 259). Now, it may safely be said that there the question was wholly different from the present. There was no question in that case as to the performance of a condition precedent to be ready at a certain or within a reasonable time, or such a time that the voyage in question, the adventure, should be accomplished and not frustrated. That condition had been performed: the ship had loaded and sailed in due time. The plaintiff had had a part of the benefit intended. The defendant had in justice earned part of his freight. Had the plaintiff demanded his goods at Falmouth, he ought to have paid something for their carriage there. He could not,

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therefore, well have said that he would not go on with the adventure, but undo it. But, if I am right, unless both could, neither could. Further, in that case there was no finding, nor anything equivalent to a finding, that the objects of the parties were frustrated. This case is therefore in every way distinguishable.

Then, there is the case of *Touteng* v. *Hubbard* (3 B. & P. 291). The opinion there expressed was obiter,—of weight, no doubt; but not of the same weight it would have been had it been the ratio decidendi. I cannot think that it would have been so held, had it been necessary to act on it. To hold that a charterer is bound to furnish a cargo of fruit at a time of year when there is no fruit,—at a time of year different to what he and the shipowner must have contemplated, the change to that time being no fault of his, but the misfortune at best of the shipowner,—is so extravagant, when the consequences become apparent, that it could not be. Suppose a charter to fetch a cargo of ice from Norway, entered into at such a time that the vessel would reach its destination, with reasonable dispatch, in February, when there was ice, and bring it back in June, when ice was wanted, and by perils of the seas it could not get to Norway till the ice was melted, nor return till after ice was of no value: can it be that the charterer would be bound to load? that he had agreed in those events to do so?

Another case is *Hurst* v. *Usborne* (18 C. B. 144; 25 L. J. (C.P.) 209). That is a case of which, if I knew no more than I learn from the books, I should say it did not decide the question we have before us. It is true that the report in the Law Journal (25 L. J. (C.P.) at p. 211), as Mr. Aspland pointed out, says that Mr. Justice Cresswell said he knew of no time the shipowner was bound to, except to use reasonable dispatch. Still, I cannot see from the reports that the point now before us was presented to the judges in that case. My Brother Blackburn, who was counsel in the cause, says it was intended to raise this point by the evidence that was rejected at nisi prius. No doubt, therefore, that was so; but I cannot think it so understood by the Court. I see no adjudication on it. Mr. Butt pointed out that the charter was for barley *or other lawful merchandise*. Even if for barley only, it does not appear that barley might not have been stored

at Limerick, nor that barley from Limerick arriving in England at the time it would, had the defendant loaded, would not have been as valuable as barley arriving earlier. I cannot but think it was a hasty decision: a rule was refused; and certainly one would think, after the argument we have heard, that the matter was worth discussing. At the same time, its tendency is favorable to the defendants. I think it is unsatisfactory, and, if a decision on the question now before us, wrong. Mr. Justice Willes did not seem to be of opinion that the law was as he is supposed to have laid it down in that case: see his judgment in *M'Andrew* v. *Chapple* (Law Rep. 1 C. P. 643), where, indeed, there had been a breach of his contract by the shipowner; but the observations are general. I may also properly refer to the opinions, if not of myself, of my Brothers Blackburn and Brett in *Rankin* v. *Potter* (Law Rep. 6 H. L. 83). They undoubtedly assume the law to be as the plaintiff contends.

There is also *Geipel* v. *Smith* (Law Rep. 7 Q. B. 404), nearly if not quite in point. The shipowner there was excused, not merely for refusing to take a cargo to a port which became blockaded after the charter, but also in effect for refusing to do so after the blockade was removed. Restraint of princes not only excused, but discharged him. The same, no doubt, would have been held as to the charterers.

Then, there are the cases which hold that, where the shipowner has not merely broken his contract, but so broken it that the condition precedent is not performed, the charterer is discharged: see *Freeman* v. *Taylor* (8 Bing. 124). Why? Not merely because the contract is broken. If it is not a condition precedent, what matters it whether it is unperformed with or without excuse? Not arriving with due diligence, or at a day named, is the subject of a cross action only. But, not arriving in time for the voyage contemplated, but at such a time that it is frustrated, is not only a breach of contract, but discharges the charterer. And so it should, though he has such an excuse that no action lies. *Taylor* v. *Caldwell* (3 B. & S. 826; 32 L. J. (Q.B.) 164) is a strong authority in the same direction. I cannot but think, then, that the weight of authority, as might be expected, is on the side of reason and convenience.

On the other question, viz. whether, though the charterers by

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perils insured against had a right to refuse to load the cargo, there has been a loss of freight by perils of the seas,—I am of opinion there has been.

It was argued that the doctrine of Causa proxima, non remota, spectetur, applies ; and that the proximate cause of the loss of the freight here was, the refusal of the charterers to load. But, if I am right, that the voyage, the adventure, was frustrated by perils of the seas, both parties were discharged, and a loading of cargo in August would have been a new adventure, a new agreement. But, even if not, the maxim does not apply. The perils of the seas do not cause something which causes something else. The freight is lost *unless* the charterers choose to go on. They do not. In the case of goods carried part of the voyage, and the ship lost, but the goods saved, the shipowner may carry them on if he chooses, but is not bound. Suppose he does not, his freight is lost. So, if he does not choose to repair a vessel which remains in specie, but is a constructive total loss.

For these reasons, I think the judgment should be affirmed.

My Brothers Blackburn, Mellor, and Amphlett agree in this judgment ; as does my Brother Lush, who, however, heard part only of the argument.

Judgment affirmed.

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'In the absence of any special provision made by the parties with reference to the contingency of further performance of the contract becoming impossible, moneys paid in accordance with the terms of the contract must remain where they are when that contingency occurs ; the party who has paid them, and by the contract was bound to pay them, cannot recover them back ; but, as regards future liability, the contract is at an end. It is not to be treated as rescinded ab initio, but both parties are excused from further performance of it. The law lays down this rule, because, the parties not having contemplated or provided for the event which has happened, it is impossible for the Court to ascertain exactly what the rights of the parties should be in order to effect a restitutio ad integrum, and therefore they must be left respectively in the positions which they occupied when the further performance of the contract was ascertained to have become impossible.'—Per Collins, M.R., in *Elliott* v. *Crutchley* [1904] 1 K. B. at p. 568.

Appleby *v.* Myers (1867) L. R. 2 C. P. 651

[The following statement is taken from the report of the case in the Court of Common Pleas (L. R. 1 C. P. 615) :—]

This was an action brought to recover 419*l.* for work done and materials provided by the plaintiffs, engineers, for the defendant, under the circumstances hereinafter mentioned. The following case was stated, by consent, without pleadings, for the opinion of the Court :

On the 30th of March, 1865, the plaintiffs entered into an agreement with the defendant, which was headed, ' Specification and estimate of engine, boiler, lifts, &c., for B. Meyers, Esq., Southwark Street. Messrs. Tillott & Chamberlain, architects. 30th March, 1865.' This contract contained ten distinct parts or divisions, viz. 1, boiler ; 2, engine ; 3, shafting ; 4, lifts ; 5, shafting ; 6, drying-room ; 7, copper pans ; 8, tanks ; 9, pump ; 10, steam-boxes,—under each of which headings were particular descriptions of the work to be done in connection with each respectively, and the prices to be charged for the same ; and the document concluded with these words :

' We offer to make and erect the whole of the machinery of the best materials and workmanship of their respective kinds, and to put it to work, for the sums above named respectively, and to keep the whole in order, under fair wear and tear, for two years from the date of completion. All brickwork, carpenters' and masons' work, and materials, are to be provided for us ; but the drawings and general instructions required for them to work to will be provided by us, subject to the architects' approval.

(Signed) Appleby, Brothers.'

The total cost of the above works, if they had been completed under the contract, would have amounted to 459*l.*

On the 4th of July, 1865, a fire accidentally broke out on the premises of the defendant in Southwark Street, which entirely destroyed the said premises and the works which then had been erected thereon by the plaintiffs in part performance of the contract above set out.

At the time of the fire the works contracted to be erected as aforesaid had not been completed.

The premises upon which the several works were to be erected

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were the property of the defendant, in his occupation, and under his entire control. The plaintiffs had access thereto only for the purpose of performing their contract.

At the time of the fire, portions of the items Nos. 1 to 8 were erected and fixed, and some of the materials for the others were on the premises.

The defendant had not completed the carpenters' and masons' work to be prepared by him under the agreement.

The tank had been erected by the plaintiffs, and was used by the defendant by taking water therefrom for the purposes of his business; but the other apparatus connected with it, as specified in No. 8, was not completed. The plaintiffs' workmen were still engaged in continuing the erection and completion of the same at the time of the fire.

The question for the opinion of the Court was, whether, under the above circumstances, the plaintiffs were entitled to recover the whole or any portion of the contract price.

[The Court held that the plaintiffs were entitled to be paid the value of the work done under the contract. The defendants appealed to the Court of Exchequer Chamber.]

The judgment of the Court (MARTIN, B., BLACKBURN, J., BRAMWELL, B., SHEE and LUSH, JJ.), was delivered by

BLACKBURN, J.—This case was partly argued before us at the last sittings; and the argument was resumed and completed at the present sittings.

Having had the advantage of hearing the very able arguments of Mr. Holl and Mr. Hannen, and having during the interval had the opportunity of considering the judgment of the Court below, there is no reason that we should further delay expressing the opinion at which we have all arrived, which is, that the judgment of the Court below is wrong, and ought to be reversed.

The whole question depends upon the true construction of the contract between the parties. We agree with the Court below in thinking that it sufficiently appears that the work which the plaintiffs agreed to perform could not be performed unless the defendant's premises continued in a fit state to enable the plaintiffs to perform the work on them; and we agree with them in thinking that, if by any default on the part of the defendant, his premises were rendered unfit to receive the work, the plaintiffs would have

had the option to sue the defendant for this default, or to treat the contract as rescinded, and sue on a quantum meruit. But we do not agree with them in thinking that there was an absolute promise or warranty by the defendant that the premises should at all events continue so fit. We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties; excusing both from further performance of the contract, but giving a cause of action to neither.

Then it was argued before us, that, inasmuch as this was a contract of that nature which would in pleading be described as a contract for work, labour, and materials, and not as one of bargain and sale, the labour and materials necessarily became the property of the defendant as soon as they were worked into his premises and became part of them, and therefore were at his risk. We think that, as to a great part at least of the work done in this case, the materials had not become the property of the defendant; for, we think that the plaintiffs, who were to complete the whole for a fixed sum, and keep it in repair for two years, would have had a perfect right, if they thought that a portion of the engine which they had put up was too slight, to change it and substitute another in their opinion better calculated to keep in good repair during the two years, and that without consulting or asking the leave of the defendant. But, even on the supposition that the materials had become unalterably fixed to the defendant's premises, we do not think that, under such a contract as this, the plaintiffs could recover anything unless the whole work was completed. It is quite true that materials worked by one into the property of another become part of that property. This is equally true, whether it be fixed or movable property. Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship; and therefore, generally, and in the absence of something to shew a contrary intention, the bricklayer, or tailor, or shipwright, is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether in such a case the non-completion is because the shipwright did not choose to go on with the work, as was the case in *Roberts* v. *Havelock* (3 B. & Ad. 404), or because in consequence of a fire he could not go on with it, as in *Menetone* v. *Athawes*

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(3 Burr. 1592). But, though this is the primâ facie contract between those who enter into contracts for doing work and supplying materials, there is nothing to render it either illegal or absurd in the workman to agree to complete the whole, and be paid when the whole is complete, and not till then: and we think that the plaintiffs in the present case had entered into such a contract. Had the accidental fire left the defendant's premises untouched, and only injured a part of the work which the plaintiffs had already done, we apprehend that it is clear the plaintiffs under such a contract as the present must have done that part over again, in order to fulfil their contract to complete the whole and 'put it to work for the sums above named respectively.' As it is, they are, according to the principle laid down in *Taylor* v. *Caldwell* (3 B. & S. 826; 32 L. J. (Q.B.) 164), excused from completing the work; but they are not therefore entitled to any compensation for what they have done, but which has, without any fault of the defendant, perished. The case is in principle like that of a shipowner who has been excused from the performance of his contract to carry goods to their destination, because his ship has been disabled by one of the excepted perils, but who is not therefore entitled to any payment on account of the part-performance of the voyage, unless there is something to justify the conclusion that there has been a fresh contract to pay freight pro ratâ.

On the argument, much reference was made to the Civil law. The opinions of the great lawyers collected in the Digest afford us very great assistance in tracing out any question of doubtful principle; but they do not bind us: and we think that, on the principles of English law laid down in *Cutter* v. *Powell* (6 T. R. 320; 2 Smith's L. C. 1), *Jesse* v. *Roy* (1 C. M. & R. 316), *Munroe* v. *Butt* (8 E. & B. 738), *Sinclair* v. *Bowles* (9 B. & C. 92), and other cases, the plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shewn that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract.

We think, therefore, as already said, that the judgment should be reversed.

Judgment reversed.

'The law lays down this, that if the contract is broken, the party is to be put in the same position, as far as money is concerned; but the law takes no notice of the vexation which has been suffered.'—Per Pollock, C.B., in *Hamlin* v. *Great Northern Railway Co.* (1856) 26 L. J. Ex. at p. 22.

'In the case of a wrong the damages are entirely with the jury, and they are at liberty to take into consideration the injury to the party's feelings, and the pain he has experienced, as, for instance, the extent of violence in an action for an assault; and many topics and many elements of damage find place in an action for tort or wrong of any kind which certainly have no place whatever in an ordinary action of contract.'—Ibid. at p. 23.

ADDIS *v.* GRAMOPHONE CO. LTD. [1909] A. C. 488

LORD LOREBURN, L.C.—My Lords, this is a most unfortunate litigation, in which the costs must far exceed any sum there may be at stake. A little common sense would have settled all these differences in a few minutes.

The plaintiff was employed by the defendants as manager of their business at Calcutta at 15*l.* per week as salary, and a commission on the trade done. He could be dismissed by six months' notice.

In October, 1905, the defendants gave him six months' notice, but at the same time they appointed Mr. Gilpin to act as his successor, and took steps to prevent the plaintiff from acting any longer as manager. In December, 1905, the plaintiff came back to England.

The plaintiff brought this action in 1906, claiming an account and damages for breach of contract. That there was a breach of contract is quite clear. If what happened in October, 1905, did not amount to a wrongful dismissal, it was, at all events, a breach of the plaintiff's right to act as manager during the six months and to earn the best commission he could make.

When the action came to trial it was agreed to refer the matters of account to arbitration. The causes of action for breach of contract were tried by Darling J. and a jury. The jury found for the plaintiff in respect of wrongful dismissal 600*l.*, and 340*l.*

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in respect of excess commission over and above what was earned by the plaintiff's successor between October, 1905, and April, 1906.

The Court of Appeal by a majority held that upon their view of the facts there was (apart from the account which must be taken) no cause of action, and they entered judgment for the defendants.

As to the damages of 600*l.* for wrongful dismissal a variety of controversies arose. Did what happened entitle the plaintiff to treat the breach of contract as a wrongful dismissal? If yes, then did he elect to treat the contract of service as still continuing? Was it open to the defendants to raise the point having regard to the pleadings and the amendments to the pleadings, and the way the case was conducted at the trial, and the contents of the notice of appeal to the Court of Appeal? A subsidiary dispute was raised as to the way in which the case had been in fact conducted at the trial, as to which eminent counsel did not agree. A further controversy ensued, whether the 600*l.* was intended to include salary for the six months, or merely damages because of the abrupt and oppressive way in which the plaintiff's services were discontinued, and the loss he sustained from the discredit thus thrown upon him. And, finally, a question of law was argued, whether or not such damages could be recovered in law.

My Lords, it is difficult to imagine a better illustration of the way in which litigation between exasperated litigants can breed barren controversies and increase costs in a matter of itself simple enough.

To my mind it signifies nothing in the present case whether the claim is to be treated as for wrongful dismissal or not. In any case there was a breach of contract in not allowing the plaintiff to discharge his duties as manager, and the damages are exactly the same in either view. They are, in my opinion, the salary to which the plaintiff was entitled for the six months between October, 1905, and April, 1906, together with the commission which the jury think he would have earned had he been allowed to manage the business himself. I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case. An expression of Lord Coleridge C.J. has been quoted

as authority to the contrary.[1] I doubt if the learned Lord Chief Justice so intended it. If he did I cannot agree with him.

If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment. The cases relating to a refusal by a banker to honour cheques when he has funds in hand have, in my opinion, no bearing. That class of case has always been regarded as exceptional. And the rule as to damages in wrongful dismissal, or in breach of contract to allow a man to continue in a stipulated service, has always been, I believe, what I have stated. It is too inveterate to be now altered, even if it were desirable to alter it.

Accordingly I think that so much of the verdict of 600*l.* as relates to that head of damages cannot be allowed to stand. As there is an additional dispute how much of it does relate to that head of damages, the best course will be to disallow the 600*l.* altogether, and to state in the order that plaintiff is entitled to be credited, in the account which is to be taken, with salary from October, 1905, to April, 1906.

As to the 340*l.* I think there was evidence on which the jury were entitled to find that the plaintiff could have earned more commission if he had been allowed to remain as manager.

In the result I respectfully advise your Lordships to order judgment for the plaintiff for 340*l.*, with a declaration that he is entitled to be credited, in the account now under investigation, with salary from October, 1905, to April, 1906, and with all commission on business actually done during that period which he would have been entitled to receive if he had been acting as manager.

In regard to costs, both sides have raised points which ought not to have been raised, but I think the defendants acted oppressively in detaining the plaintiff's securities. The plaintiff has succeeded in recovering a substantial sum, and the judgment in his favour should be with costs here and below.

[1] 'The plaintiff by reason of his being dismissed during his apprenticeship with a slur on his character naturally would experience a greater difficulty in getting employment elsewhere': 25 Q. B. D. at p. 108.

ADDIS v. GRAMOPHONE COMPANY, LIMITED. — Lord Atkinson.

LORD ATKINSON.—My Lords, I entirely concur with the judgment of my noble and learned friend on the woolsack. Much of the difficulty which has arisen in this case is due to the unscientific form in which the pleadings, as amended, have been framed, and the loose manner in which the proceedings at the trial were conducted.

The rights of the plaintiff, disembarrassed of the confusing methods by which they were sought to be enforced, are, in my opinion, clear. He had been illegally dismissed from his employment. He could have been legally dismissed by the six months' notice, which he, in fact, received, but the defendants did not wait for the expiry of that period. The damages plaintiff sustained by this illegal dismissal were (1.) the wages for the period of six months during which his formal notice would have been current; (2.) the profits or commission which would, in all reasonable probability, have been earned by him during the six months had he continued in the employment; and possibly (3.) damages in respect of the time which might reasonably elapse before he could obtain other employment. He has been awarded a sum possibly of some hundreds of pounds, not in respect of any of these heads of damage, but in respect of the harsh and humiliating way in which he was dismissed, including, presumably, the pain he experienced by reason, it is alleged, of the imputation upon him conveyed by the manner of his dismissal. This is the only circumstance which makes the case of general importance, and this is the only point I think it necessary to deal with.

I have been unable to find any case decided in this country in which any countenance is given to the notion that a dismissed employee can recover in the shape of exemplary damages for illegal dismissal, in effect damages for defamation, for it amounts to that, except the case of *Maw* v. *Jones* (25 Q. B. D. 107).

In that case Mathew J., as he then was, during the argument, while counsel was urging, on the authority of *Hartley* v. *Harman* ((1840) 11 Ad. & E. 798, 800), that the measure of damages for the improper dismissal of an ordinary domestic servant was a month's wages and nothing more, no doubt interjected in the shape of a question the remark, 'Have you ever heard that principle applied to a case where a false charge of misconduct

has been made ?' But the decision was that the direction of the judge at the trial was right.

Now, what was the character of that direction ? The defendant had power to dismiss his apprentice, the plaintiff, on a week's notice, and had also power to dismiss him summarily if he should shew a want of interest in his work. He dismissed the apprentice summarily without notice, assigning as a reason that he had been guilty of frequent acts of insubordination and that he had gone out at night without leave.

The judge at the trial told the jury that they were not bound to limit the damages to the week's notice he had lost, but that they might take into consideration the time the plaintiff would require to get new employment—the difficulty he would have as a discharged apprentice in getting employment elsewhere—and it was on this precise ground the direction was upheld. I do not think that this case is any authority whatever for the general proposition that exemplary damages may be recovered for wrongful dismissal, still less, of course, for breach of contract generally ; but, such as it is, it is the only authority in the shape of a decided case which can be found upon the first-mentioned point.

I have always understood that damages for breach of contract were in the nature of compensation, not punishment, and that the general rule of law applicable to such cases was that in effect stated by Cockburn C.J. in *Engel* v. *Fitch* ((1868) L. R. 3 Q. B. 314, 330) in these words : ' By the law of England as a general rule a vendor who from whatever cause fails to perform his contract is bound, as was said by Lord Wensleydale in the case referred to, to place the purchaser, so far as money will do it, in the position he would have been in if the contract had been performed. If a man sells a cargo of goods not yet come to hand, but which he believes to have been consigned to him from abroad, and the goods fail to arrive, it will be no answer to the intended purchaser to say that a third party who had engaged to consign the goods to the seller has deceived or disappointed him. The purchaser will be entitled to the difference between the contract price and the market price.'

In *Sikes* v. *Wild* ((1861) 1 B. & S. 587, at p. 594) Lord Blackburn says : ' I do not see how the existence of misconduct can alter

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the rule of law by which damages for breach of contract are to be assessed. It may render the contract voidable on the ground of fraud or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself.'

There are three well-known exceptions to the general rule applicable to the measure of damages for breach of contract, namely, actions against a banker for refusing to pay a customer's cheque when he has in his hands funds of the customer's to meet it, actions for breach of promise of marriage, and actions like that in *Flureau* v. *Thornhill* ((1776) 2 W. Bl. 1078), where the vendor of real estate, without any fault on his part, fails to make title. I know of none other.

The peculiar nature of the first two of these exceptions justified their existence. Ancient practice upholds the last, though it has often been adversely criticized, as in *Bain* v. *Fothergill* ((1874) L. R. 7 H. L. 158). If there be a tendency to create a fourth exception it ought, in my view, to be checked rather than stimulated ; inasmuch as to apply in their entirety the principles on which damages are measured in tort to cases of damages for breaches of contract would lead to confusion and uncertainty in commercial affairs, while to apply them only in part and in particular cases would create anomalies, lead occasionally to injustice, and make the law a still more ' lawless science ' than it is said to be.

For instance, in actions of tort motive, if it may be taken into account to aggregate damages, as it undoubtedly may be, may also be taken into account to mitigate them, as may also the conduct of the plaintiff himself who seeks redress. Is this rule to be applied to actions of breach of contract ? There are few breaches of contract more common than those which arise where men omit or refuse to repay what they have borrowed, or to pay for what they have bought. Is the creditor or vendor who sues for one of such breaches to have the sum he recovers lessened if he should be shewn to be harsh, grasping, or pitiless, or even insulting, in enforcing his demand, or lessened because the debtor has struggled to pay, has failed because of misfortune, and has been suave, gracious, and apologetic in his refusal ? On the other hand, is that sum to be increased if it should be shewn that the debtor could have paid readily without any

embarrassment, but refused with expression of contempt and contumely, from a malicious desire to injure his creditor?

Few parties to contracts have more often to complain of ingratitude and baseness than sureties. Are they, because of this, to be entitled to recover from the principal, often a trusted friend, who has deceived and betrayed them, more than they paid on that principal's behalf? If circumstances of aggravation are rightly to be taken into account in actions of contract at all, why should they not be taken into account in the case of the surety, and the rules and principles applicable to cases of tort applied to the full extent?

In many other cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress, he may, no doubt, recover exemplary damages, or what is sometimes styled vindictive damages; but if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action: *Thorpe* v. *Thorpe* ((1832) 3 B. & Ad. 580). One of these consequences is, I think, this: that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more.

I can conceive nothing more objectionable and embarrassing in litigation than trying in effect an action of libel or slander as a matter of aggravation in an action for illegal dismissal, the defendant being permitted, as he must in justice be permitted, to traverse the defamatory sense, rely on privilege, or raise every point which he could raise in an independent action brought for the alleged libel or slander itself.

In my opinion, exemplary damages ought not to be, and are not according to any true principle of law, recoverable in such an action as the present, and the sums awarded to the plaintiff should therefore be decreased by the amount at which they have been estimated, and credit for that item should not be allowed in his account.

LORDS JAMES, GORELL, and SHAW agreed; LORD COLLINS dissented.

HADLEY v. BAXENDALE.

'The Common Law Courts never enforced contracts specifically, as was done in equity; if a contract was broken, the common law held that an adequate solatium was to be found in a pecuniary sum, that is, in the damages assessed by a jury. But there is no other universal principle as to the amount of damages than that it is the aim of the law to ensure that a person whose contract has been broken shall be placed as near as possible in the same position as if it had not. The assessment is sometimes a matter of great difficulty. It is impossible in many cases to regard the damage that has followed the breach as that for which the plaintiff is to be compensated, for the injury to the plaintiff may depend on matters which have nothing to do with the defendant. For example, an innkeeper furnishes a chaise to a son to drive to see his dying father; the chaise breaks down; the son arrives too late to see his father, who has cut him out of his will in his disappointment at his not coming to see him; in such a case it is obvious that the actual damage to the plaintiff has nothing to do with the contract to supply the chaise. Therefore at an early stage the limitation was imposed that damages for breach of a contract must be such as might naturally be supposed to be in the contemplation of the parties at the time the contract was entered into; damages, in order to be recoverable, must be such as arise out of the contract and are not extraneous to it.'—Per Fletcher Moulton, L.J., in *Chaplin* v. *Hicks* [1911] 2 K. B. at p. 794.

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At the trial before Crompton, J., at the last Gloucester Assizes, it appeared that the plaintiffs carried on an extensive business as millers at Gloucester; and that, on the 11th of May, their mill was stopped by a breakage of the crank shaft by which the mill was worked. The steam-engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by twelve o'clock any day, it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the

sum of 2*l.* 4*s.* was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants, it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned Judge left the case generally to the jury, who found a verdict with 25*l.* damages beyond the amount paid into Court.

[A rule nisi was obtained for a new trial on the ground of misdirection.]

The judgment of the Court (PARKE, ALDERSON, PLATT, and MARTIN, B.B.) was delivered by

ALDERSON, B.—We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The Courts have done this on several occasions; and, in *Blake* v. *Midland Railway Company* (18 Q. B. 93), the Court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned Judge at Nisi Prius.

'There are certain established rules,' this Court says, in *Alder* v. *Keighley* (15 M. & W. 117), 'according to which the jury ought to find.' And the Court, in that case, adds: 'and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken.'

Now we think the proper rule in such a case as the present is this:—Where two parties have made a contract which one of

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them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case ; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said, that other cases such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognisant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers

of that mill. But how do these circumstances shew reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The Judge ought, therefore, to have told the jury, that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

Rule absolute.

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'A person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract. That is the principle really at the bottom of *Hadley* v. *Baxendale*. Now, how much of the damages claimed may reasonably be supposed to have been in the contemplation of the parties at the time of making the contract depends in every case upon how much of the real situation of the parties was so disclosed by the purchaser to the vendor at the time the contract was made, as to render it a fair inference of fact that damages of that class were intended to be recouped if they were suffered.'—Per Bowen, L.J., in *Grébert-Borgnis* v. *Nugent* (1885) 15 Q. B. D. at p. 92.

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Appeal from the judgment of Field, J., at the trial.

The action was for breach of warranty on a contract to supply coal, the terms of which in substance imported that the coal was to be steam-coal reasonably fit to be used for the purposes of steamships. The plaintiffs claimed by way of damages the amount of damages which had been recovered from them in an action by sub-vendees of the coal supplied under the contract, the contract by them with their sub-vendees being for the supply of coal of a similar description to that mentioned in the contract between the plaintiffs and the defendant; and the plaintiffs also claimed by way of damages the costs incurred by them in defending such action. The defendant paid into court sufficient to satisfy the damages recovered from the plaintiffs by their sub-vendees, but denied his liability in respect of the claim made for costs.

The facts at the trial appeared to be as follows:—The defendant was a coal merchant, and the plaintiffs were shipping agents at Dover. It was known to the defendant to be part of the plaintiffs' business to supply coal to steamships calling there. The plaintiffs contracted with the defendant for the supply to them of a quantity of 'steam-coal' for the purpose of being used on steamships, the defendant knowing at the time when the contract was made that the plaintiffs were buying the coal for the purpose of reselling the same as steam-coal fit for use in steamships. The plaintiffs entered into a contract for the sale of coal to the owners of steamships under substantially the same description as that by which the coal was sold to them. The coal delivered by the defendant to the plaintiffs under the contract and by them delivered to their sub-vendees was not reasonably fit for use as steam-coal for the purposes of steamships, but it

appeared that this defect in quality could not be ascertained by inspection of the coal, and would only become apparent when the coal was used on board ship. A claim being made against the plaintiffs by their sub-vendees in respect of the bad quality of the coal, the plaintiffs wrote to the defendant informing him of such claim, and requested him to supply them with certificates from the mineowners, from whom he had procured the coal, certifying what the coal really was. The defendant did forward to the plaintiffs a certificate from the mineowners in South Wales that the coal was of the description specified in the contract, and various certificates from persons to whom similar coal had been supplied that it was of good quality and got up steam very well. Before the trial of the action by the sub-vendees against the plaintiffs, the plaintiffs' solicitors wrote to the defendant, proposing that he should co-operate in the defence and agree to be bound by the verdict and damages, if any. The answer of the defendant was in substance, that he declined to interfere in the matter, as he utterly repudiated any liability to the plaintiffs, he having duly carried out his contract with them.

At the trial of the action by the sub-vendees against the plaintiffs, the jury found that the coal was not reasonably fit for use as steam-coal on board steamships, and judgment for damages was thereupon given against the present plaintiffs, with costs. The learned judge was of opinion, that under the circumstances the plaintiffs acted reasonably in defending the action against them and going to trial, and that they were therefore entitled to recover the costs thereby incurred from the defendant; and he gave judgment accordingly.

Against this judgment the defendant appealed.

BOWEN, L.J.—In this case, as it appears to me, we have to apply to a special subject-matter, viz., the breach of a particular kind of contract made under special circumstances, the general rule of law with regard to the measure of damages laid down in *Hadley* v. *Baxendale* (9 Ex. 341). The law is laid down in that case; the only question is as to its application under the circumstances of the present case. The rule as laid down in that case is, that 'where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as

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may be fairly and reasonably considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. It seems to me that the latter portion of that rule is what we have in this case to apply. In the present case the costs incurred by the plaintiffs in defending a previous action brought against them by their sub-vendees are the subject-matter of the action. To such costs we have to apply the second branch of the rule which I have mentioned: and the question therefore is whether such costs under the special circumstances of the case come within the words there used. Is the damage occasioned to the plaintiffs by the loss of such costs a damage which may reasonably be supposed to have been within the contemplation of the parties, at the time when they made the contract, as a probable result of the breach of it? The way in which this branch of the rule should be brought to bear upon a somewhat cognate class of cases, viz., where damages recovered against one of the contracting parties by a third person are sought to be recovered from the other contracting party, has been illustrated by the judgment of this Court in *Grébert-Borgnis* v. *Nugent* (15 Q. B. D. 85). No new law, however, was laid down in that case, though it is one of some importance, because it contained an elaborate exposition of the manner in which the second branch of the rule in *Hadley* v. *Baxendale* (9 Ex. 341) is to be applied in such cases; and difference of subject-matter does not necessarily prevent the case being useful as an illustration how the rule should be applied in another case. I propose to begin by asking myself what may be reasonably supposed to have been in the contemplation of the parties when they entered into the contract containing a warranty that the coal to be supplied was steam-coal fit for use on steamships. As soon as that question is answered, the solution of the problem is arrived at, and we know whether the case falls within the rule in question. Here was a case of a sale of coal by the defendant, who had purchased the coal from his correspondents in Wales, to the plaintiffs, who were mere shipping agents, and who resold with the same warranty as that with which they had themselves purchased from the defendant. The defendant knew for what purpose the plaintiffs were purchasing the coal, viz., to resell it

to the owners of steamers, and he must have known as a business man what damages might naturally result to the sub-vendees if it was not reasonably fit for the purposes of steamships, and therefore could not be used by the sub-vendees for such purposes. He may therefore be reasonably supposed to have contemplated, if the warranty were broken, that claims for damages would be made against the plaintiffs by the sub-vendees, and also, if he thought about it, he must have known that the plaintiffs, if such claims were made, would be in a position of difficulty : on the one side would be the sub-vendees who had tried the coal insisting that it was bad and incapable of being used as steam-coal, and that they had in consequence sustained damage ; on the other side would be the defendant who knew more about the origin of the coal than the plaintiffs did, and who might refuse to be bound by any action they might take with regard to the sub-vendees' claims and assert that such action was unreasonable. What under such circumstances might the defendant be reasonably supposed to contemplate in the event of such a contingency happening ? Obviously that the plaintiffs would come to their vendor in order to know how to deal with the claim, and that it would depend very much on what he said what course they would take, and whether they would defend the action or not. If the vendor said that the assertions of the sub-vendees with regard to the inferior quality of the coal were unfounded, the plaintiffs would naturally attach much weight to that ; on the other hand, if he said that he had been imposed on by his vendors, naturally they would submit to the claims of their sub-vendees. What further could the defendant reasonably be supposed to contemplate ? Why that, if under such circumstances he told the plaintiffs that, if they did not defend the action, it would be at their own responsibility and risk, and that the coal he sent was according to contract, the plaintiffs' only reasonable course would be to fight the action in order to thrash the question out ; and, then, of course, if the plaintiffs succeeded in their defence, there would be no occasion for their making any claim over ; but if they failed the defendant must in reason be taken to have contemplated that they would have to pay damages and costs. All these matters I have mentioned seem to me to be matters that may reasonably be supposed to have been within the contemplation of the parties at the time they made the con-

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tract, and therefore the question whether the case comes within the second branch of the rule in *Hadley* v. *Baxendale* (9 Ex. 341) seems to me to be answered, unless the argument of the defendant's counsel with regard to the construction of that rule is to be accepted. I pause here to point out that in this particular case there is a very special state of facts; because the defendant was consulted before the action was defended, as the correspondence shews, and he thereupon insisted that the coal was according to the contract, and so he may be said really to have driven the plaintiffs to defend the action; and not only that, but the damages recovered in the action were paid by the defendant into court, whereby the defendant admits that he is bound to recoup the plaintiffs in respect of those damages; so that the case is not complicated by any question whether the action against the defendant involves any damage recovered in the previous action, which as against him might be too remote or special. These are important matters to consider in applying our decision in this case, if it should ever be cited hereafter, to the circumstances of other cases. It is beyond question, by reason of this payment into court, coupled with the admissions made by counsel during the argument, that the course taken by the plaintiffs in defending the action by their sub-vendees was a reasonable course to take. Therefore the case comes to this question, viz., whether we can possibly say that it cannot reasonably be supposed to have been within the contemplation of the contracting parties that, the plaintiffs being sued by their sub-vendees and inquiring of the defendant as to the quality of the coal and being told by him that that coal was according to contract, they would do what was plainly reasonable in defending the action. The reason why I have dwelt so on the particular details of this case is because, like the Master of the Rolls, I conceive that we are in this case merely applying an existing rule of law: not laying down any such doctrine as that in the case of every contract of sale, where there is a subsale, the costs of the defence of an action brought by the sub-vendee for breach of a warranty similar to that contained in the original contract of sale are recoverable within the rule in *Hadley* v. *Baxendale* (9 Ex. 341).

How, then, does the defendant's counsel meet the suggested application of that rule to the special circumstances of this case? He contends that the costs of defending an action are necessarily

outside the damages that can be considered as resulting from the breach of warranty. I cannot see that he gave any sufficient reason for that conclusion. He argued that such costs could only be within the rule as to measure of damages where they are the subject of a special contract of indemnity, either express or to be implied from the circumstances. We invited him to explain what he meant by an implied contract of indemnity in this relation. He said that such a contract would be implied where the circumstances were such that a person must be considered to have contracted with another person to perform a contract upon which such other person was liable. But, if he is right, in such a case the application of the rule in *Hadley* v. *Baxendale* (9 Ex. 341) would be unnecessary ; because, if there is what amounts to a special bargain as to the costs, the question whether they can be treated as damages, the consequences of the breach of contract, does not arise. They are the subject-matter of the contract itself, and the case is like that of any other contract to pay a sum of money. I doubt myself whether it is a true view to say that there is any contract of indemnity in such a case as this, though it is really unnecessary to decide that point ; I doubt whether out of the contract to do a particular thing, you can extract a contract, if that is not done, to do something else. The reasons against this view of the matter were expressed by the Court in the case of *Hydraulic Engineering Co.* v. *McHaffie* (4 Q. B. D. 670), by my brother Fry and myself in the case of *Birmingham Land Co.* v. *London and North Western Ry. Co.* (34 Ch. D. 261), and by the late Master of the Rolls in *Hornby* v. *Cardwell* (8 Q. B. D. 329). If the expressions used by the present Master of the Rolls in the last-mentioned case are to be considered as really conflicting with what he said in *Hydraulic Engineering Co.* v. *McHaffie* (4 Q. B. D. 670), with great submission I should consider what he said in the latter case as of more authority, because it is obvious that there the point was definitely suggested to his mind for consideration, whereas in the other case it was not, and if it had been, he would probably have said that whether the case was treated as one of indemnity or as coming within the rule in *Hadley* v. *Baxendale* (9 Ex. 341) the result would be the same. I do not wish, however, to express any opinion on this point, for it seems to me unnecessary to do so.

Assuming that there is no contract of indemnity, can it be said

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that such costs can never come within the second branch of the rule in *Hadley* v. *Baxendale* (9 Ex. 341) ? If so then, although it be assumed that beyond question it was actually present to the minds of both parties that the result of the breach of contract would be an action against one of them, and that he would under the circumstances be compelled as a reasonable man to defend that action, and that he might lose, yet the costs incurred by him could not be recoverable within the rule. Why should this be so ? What is there peculiar in the nature of costs to exclude them from the ordinary rule ? If on the other hand they can be within the rule, then whether the particular costs in question are within it must be determined with reference to the circumstances of the particular case. I suppose the suggestion with regard to the peculiarity of costs may be that when a litigation once begins, no one knows where it will end, and that it may go to the House of Lords, but I do not say that, because costs in a particular case may be recoverable within the rule in *Hadley* v. *Baxendale* (9 Ex. 341), therefore all costs would be so. It would be necessary to consider at each stage how far the particular costs came within the rule. Against the contention that no costs can come within it, there is, as it appears to me, an abundance of authority. One such authority, for instance, is the case of *Collen* v. *Wright* (8 E. & B. 647). It is true that that case belongs to a different class of cases, viz., where a person who has professed to act as an agent is sued on an implied warranty of authority. In that case Willes, J., said, after describing the implied contract that arose, ' With respect to the amount of damages, I retain the opinion thrown out in the course of the argument that all the expenses sought to be recovered were occasioned by the assertion of authority made at the time of the contract being continued and persisted in by the defendant's testator and bonâ fide acted on by the plaintiff.' Although the origin of the obligation to repay such expenses differs in the two cases, yet it is common ground in that case and the present that the costs might be recovered, because in each case they were damages naturally resulting from the breach of contract, in the one case an implied warranty of authority, in the other the express warranty of the quality of the articles sold. I know of no ground on which such costs could be recoverable in the one case that is not applicable

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to the other. Various other cases were cited with regard to the question whether such costs as these could be recovered as damages. It is unnecessary to go through them all, but I desire to make with regard to such cases these general observations: either they were cases in which costs were dealt with before the decision in *Hadley* v. *Baxendale* (9 Ex. 341), or they were cases in which the costs were unreasonably incurred, and where of course they could not come within the rule in *Hadley* v. *Baxendale* (9 Ex. 341); or they were cases in which the rule was wholly inapplicable. I wish to say a few words with regard to the decision in *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (Law Rep. 10 Ex. 35). I feel the same difficulty as the Master of the Rolls in dealing with that case. Most, if not all, of the judges who decided that case seem to have thought that the first action was unreasonably defended. If so, no question could possibly arise under the rule in *Hadley* v. *Baxendale* (9 Ex. 341); but, if that was the general opinion, why did they not decide the case simply on that ground? They must have meant something more than that, but what, I confess, I do not at present exactly understand; but in any case I do not think they laid down anything that really conflicts with our present judgment; on the contrary, it seems to me that all the judgments proceeded on facts which entirely distinguish that case from the present, and take it out of the category of cases which could come within the second branch of the rule in *Hadley* v. *Baxendale* (9 Ex. 341). For these reasons I agree that the appeal should be dismissed.

Lord Esher, M.R., and Fry, L.J., delivered judgment to the same effect.

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'It seems to have been accepted as the law from the case of *Hadley* v. *Baxendale* downwards, that where notice is given to the carrier of the special circumstances, and he consents nevertheless to carry the goods without objection, he may be liable for the extraordinary damages arising out of such circumstances. I agree, however, with the suggestion that the notice in such cases can have no effect except so far as it leads to the inference that a term has been imported into the contract making the defendant liable for the extraordinary damages.'—Per Lush, J., in *Horne* v. *Midland Railway Co.* (1873) 8 C. P. at p. 145.

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THE BRITISH COLUMBIA AND VANCOUVER'S ISLAND SPAR, LUMBER AND SAW-MILL CO. LTD. *v.* NETTLESHIP (1868) 37 L. J. C. P. 235 [S. C. L. R. 3 C. P. 499]

This was an action brought by the plaintiffs, as freighters, against the defendant as owner of the ship *Kent*, for not carrying and delivering one out of several cases of machinery, shipped under a charterparty, to be carried from Glasgow to British Columbia, whereby the plaintiffs not only lost the value of the said case of machinery but were unable to use the rest of the machinery for a long time.

At the trial, it appeared that the defendant, being owner of one-half of the ship *Kent*, and one Baunton, the owner of the other half, and also master, the latter entered into a charterparty with the plaintiffs for carrying a certain number of cases of goods, part from Liverpool and part from Glasgow, to British Columbia; that amongst the goods sent down to be shipped at Glasgow were several cases of machinery, constituting the machinery for a saw-mill, to be erected by the plaintiffs in British Columbia; that one case was missing when the ship arrived, and, as it would seem, was never actually on board, but was lost, most likely at the shipping-place, after being delivered at the quay where the vessel was lying, and before it was put on board; and that the rest of the machinery was useless till another case of machinery was forwarded from England.

The learned Judge, Bovill, C.J., directed the jury to consider whether the case was 'delivered to those in charge of the ship to be loaded,' and on their answering this question in the affirmative, a verdict was found for the plaintiffs for 3,000*l.* (the damages in the declaration), under the following order.

'It is ordered by the Court, with the consent of all parties, their counsel and attorneys, that the verdict found for the plaintiffs be entered for damages 3,000*l.*, costs 40*s.*, with leave reserved for the defendant to move the Court to reduce such damages to such sum as the Court may think proper, and that for the purpose of obtaining the opinion of the Court upon such rule as to the principle upon which the damages are to be assessed, the plaintiffs are to deliver to the defendant a concise statement of the nature of the damages they claim, with

such explanations as may be necessary to make the statement intelligible.'

The following statement was agreed upon by the parties as to the question of damages :

'The following is the concise statement of the nature of the damages claimed by the plaintiffs in this action, drawn up pursuant to the order of Nisi Prius herein, dated the 13th of February, 1868, for the purpose of obtaining the opinion of the Court as to the measure of damages upon the rule to be moved for by the defendant to reduce the damages as mentioned in the said order.

1. The defendant was part-owner of the ship *Kent*. The master of that ship, who was also a part-owner of her, knew, when he agreed to carry the goods referred to in the charterparty and bill of lading sued upon, that the said goods, consisting of different parts of machinery, were intended for a mill intended to be erected and used in British Columbia for the purpose of the business of the plaintiffs in cutting and sawing timber.

2. The said master at the same time knew that the missing box contained part of the said machinery. The defendant had no personal knowledge as to the contents of the box or the nature of the cargo, save that it consisted of machinery.

3. The actual cost to the plaintiffs of replacing the missing machinery, including freight to British Columbia, was 353*l.* 17*s.* 9*d.*

4. The time occupied in replacing it was between eleven and twelve months, during which time the whole of the mill, of which the missing portion formed part, was stopped and useless. The defendant contends that the missing machinery could have been replaced much earlier.

5. The plaintiffs allege that a fair rate of hire or use and occupation value at British Columbia of the missing portion, taken by itself, from the time when it ought to have been delivered until the time when it was replaced, would be 2,646*l.* 2*s.* 3*d.* The defendant contends that there was no known rate of hire or use and occupation value at British Columbia for the said missing portion.

6. The plantiffs allege that a fair rate of hire or use and occupation value at British Columbia of the whole machinery, of which the said missing portion formed part, to be applied to the purposes for which it was required by the plaintiffs for the said period, would

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be 2,646*l.* 2*s.* 3*d.* The defendant contends that there was no known rate of hire or use and occupation value at British Columbia for the whole machinery.

7. The plaintiffs allege that the actual loss to the plaintiffs greatly exceeded these amounts: but the defendant contends that the plaintiffs' alleged loss (if any) beyond the said sum of 353*l.* 17*s.* 9*d.* proceeded from other causes. The plaintiffs claim the actual cost of replacing the said machinery, and also a rental or use and occupation value of the whole of the machinery, or of such part as the Court may think them entitled to from the time the missing portion ought to have been delivered until it was replaced.

8. The above figures are stated hypothetically; and it is agreed that it shall be left to an arbitrator, to ascertain the amounts in accordance with the opinion of the Court, and also to ascertain any other amounts or facts which, according to the opinion of the Court, may be decided to be material in determining the amount of the damages.

A rule nisi was granted to reduce the damages, and after argument the following judgment was delivered by

WILLES, J.—These cases are difficult to deal with. They begin with a case about two centuries ago, where a man who was going to be married had his horse pricked by a blacksmith and lamed, whereby he arrived late and lost his marriage; in which case according to the legal notions of that time, the plaintiff was held to be entitled to recover damages for losing his marriage. We shall get into the same absurdity, unless we apply some common sense to restrain the extent to which a man may be liable because of a breach of contract as to a chattel of small value. The civil lawyers dealt with the matter precisely by providing that in the absence of fraud no damages for the breach of a contract as to a specific chattel shall be recoverable beyond double the value of the chattel. This positive rule of the Roman law was not, however, introduced into France, where, as is pointed out by Pothier, the damages are under the equitable control of the Judge.

What then ought to be the rule? I am inclined to take a narrow view, and say that a carrier ought not to be obliged to bear the risk of a bailor losing a benefit where he is not paid for it; and as the ten guineas freight paid for the two and a half tons in this

case, was the ordinary freight, and the contract was on the ordinary terms for the ordinary liability, we ought not to arrive at a conclusion which would fix the ship owner with further liability, so that if the goods by the default of the ship owner do not arrive he is to be answerable to the plaintiff for all profits the mill would have made if it were built and successful and had no rivals. If this matter had been brought to the ship owner's knowledge, not as mere information but as the basis of liability, he would have rejected the contract, and it is absurd to contend that mere knowledge that the chattel is to be used in a specific manner is to fix the carrier, when, if it had been suggested he was to be responsible, he would have rejected the liability if he had a choice; and if he were a common carrier he could not even choose. This leads to the conclusion that mere knowledge of the specific use to which the chattel is to be applied is not to increase the carrier's liability, but that there must be knowledge under such circumstances that he knows the other party intends him to be liable for the special consequences, and whether we are to say that the liability ought to be expressed in the contract, or that there should be knowledge and acceptance of the liability, bare knowledge is not enough. There must be enough to satisfy a jury that he intended to undertake a special responsibility. The knowledge is to be brought home to him under circumstances in which he knows the other contracting party reasonably expects him to be liable.

As respects the present case, several circumstances occur to shew that there was no such knowledge. The carrier did not know that all the machinery would become useless if this part were lost, or what the part was, or that it could not be replaced, or, at least, that it could not be replaced in British Columbia at a higher price, and applying what I have already said, even if he did, he did not know under such circumstances that he knew that it was intended to make him liable. Mere knowledge is not sufficient, for it is consistent with a repudiation of liability, the matter must be part of the contract of carriage or the collateral contract as to liability for damages, e. g. knowledge from a stranger, would not affect the case between the parties; such knowledge is only evidence of fraud, which is not suggested here, or that there was an understanding of the parties that it was to be treated as the basis of the contract. Pothier, in his *Traité des*

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Obligations, s. 162, indicates this in saying, 'Sometimes the debtor is liable for damages and interest of the creditor, though extrinsic, which is the case when it appears that they were contemplated in the contract, and that the debtor submitted to them either expressly or tacitly in the case of the non-performance of his obligation.' And this is what was meant by Cockburn, C.J., when he said in *Cory* v. *The Thames Ironworks, &c., Co.* (37 L.J. (1868) Q. B. 68. s.c. L. R. 3 Q. B. 181) 'It may be fairly inferred that the seller intended to be responsible for what would be the obvious use of the vessel.' And as respects the other authorities which have been alluded to in argument, I will only observe, that *Ogle* v. *Vane* ((1868) L. R. 3 Q. B. 272) is not in point, as there, after breach, there was an express agreement; and that in the case of *the Columbus* (3 W. Rob. 158), which was a case of collision, the whole value of the vessel being given, a claim for demurrage was disallowed.

Such then is the rule, and what a field of enquiry would be opened if any other rule were adopted; we should have to go into an imaginative calculation of the chances of success of a new trade, and to value matters purely speculative; and I am not sure the case would not fall within the rule laid down in *James* v. *Morgan* (B. R. 15 Car. 2; 1 Lev. 111; 1 Keb. 569), the case as to the number of nails in the horse's shoes; there the jury were told that if it was a catching bargain they should give only the value of the horse. We should be entering on an impossible task, and be fixing extraordinary consequences on the carrier. The case may be put of a person taking a passage to undertake the duties of an appointment abroad, to get which he must arrive at a certain time, and it would be absurd to hold the carrier liable for his loss. Suppose the passenger were going to get into business and expecting great profits, and the shipping agent knew it, surely the passenger could not recover, say 10,000*l.* because he was delayed and lost his chance.

I am of opinion, therefore, that the plaintiffs can only recover the value of the lost goods and interest on that amount, i. e. the sum of 353*l.* 17*s.* 9*d.*, with interest thereon till payment.

Bovill, C.J., delivered judgment to the same effect, and Byles, J., agreed.

Rule discharged.

The Sale of Goods Act, 1893, Sect. 51, enacts :—

(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is primâ facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

BROWN *v.* MULLER (1872) L. R. 7 Ex. 319

This was an action for non-delivery of iron.

At the trial before Lush, J., at the Liverpool Spring Assizes, 1872, it was proved that on the 21st of August, 1871, the plaintiff bought of the defendant 500 tons of iron of a specified quality, 'delivery in about equal monthly quantities over September, October, and November.' A misunderstanding having arisen about the exact quality of iron to be supplied—whether it was to be 'forge' or 'foundry' of a particular number—the defendant, on the 24th of August, wrote to the plaintiff to request him 'to consider the matter off,' and on the 5th of September informed him in another letter that he regarded the contract as cancelled, and had expunged the order from his books.

The plaintiff did not reply to these letters, and on the 25th of October demanded delivery of 200 tons 'as per contract.' The defendant declined to deliver, alleging there had never been a contract. On the 4th of December the plaintiff wrote, stating that he had bought at the end of November 500 tons of iron against the quantity the defendant had refused to deliver. This action was brought to recover 237*l.* 10*l.*, being the difference between the contract price and that at which the plaintiff had bought. If the plaintiff had bought in when the defendant repudiated the contract the difference would have been 25*l.*; if he had bought in one-third at the end of each of the three months the sum of differences would have amounted to 109*l.* 4*s.*

A verdict was entered for the plaintiff for the full amount, with

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leave to the defendant to move to reduce the damages to such sum as the Court should direct.

A rule was obtained accordingly on the ground that the damages ought to be assessed with regard to the difference between the two prices at the time when the defendant gave notice to the plaintiff of his intention not to deliver any iron, or with regard to the difference on the 30th of September.

KELLY, C.B.—I should not have felt much doubt as to what should be the measure of damages in this case, but for the hesitation expressed during the argument by my Brother Martin; a hesitation which, however, I understand now to be removed. The defendant undertook in this case to deliver 500 tons of iron during the months of September, October, and November, 1871, in about equal portions; that is at the rate of about 166 tons in each month; and he has failed to deliver altogether. Now the proper measure of damages is that sum which the purchaser requires to put himself in the same condition as if the contract had been performed. This being the general principle of assessment, we find that the defendant delivered no iron in September, and on the 30th of that month, I think, the plaintiff was entitled to receive, as damages, the difference on that day between the contract and market price of 166 tons. No other satisfactory principle can be suggested. The plaintiff might have resold this amount of iron to a sub-purchaser, and to satisfy this sub-contract might have bought at the then market price; or else must have paid the sub-purchaser the difference; and in either case would be entitled to receive it from the defendant. Then, when the 31st of October arrives, the same state of things recurs as to the second instalment of iron to be delivered; and again the damages will be the difference between the contract and market prices on that day. And a similar calculation must be made with reference to the end of November. Therefore the plaintiff will be entitled to recover, altogether, the sum of the three differences at the end of the three months respectively.

It has been argued with much ingenuity that the damages ought to be estimated at a lower figure if it appear that when the defendant announced his intention of not delivering, or at all events when the first breach took place, and it became apparent

that the contract could never be performed at all, the plaintiff might have entered into a new contract to the same effect as the old one for the months of October and November on as favourable terms; and if the plaintiff, on hearing he would never get delivery, was bound to go and obtain, if he could, the new contract suggested, then, no doubt, assuming that he might have made such a contract, the damages ought to be limited to his loss at that time. But there was, in my opinion, no such obligation. He is not bound to enter into such a contract, which might be either to his advantage or detriment, according as the market might fall or rise. If it fell, the defendants might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand. Or again, by such a course, the plaintiff might be seriously injured and yet have no remedy. Suppose, for example, his new contract was with a person who proved insolvent. He would, in that case, be without redress; he would have lost his former contract, and his new one would turn out worthless. In either event, therefore, I do not think the plaintiff could be called upon to enter into a fresh contract. If he did, and thus obtained an advantage, he no doubt might save the defendant from some damages. But if he should suffer a loss, as by the insolvency of the new contractor, he could not make the defendant answer for it. And if it should happen that he might have done better for the defendant by waiting and making no speculative contract, the defendant would in his turn have a fair right to complain that his loss had not been mitigated as far as possible.

The case of *Frost* v. *Knight* (7 L. R. (Ex.) 111) has been referred to as shewing that there is a difference between cases where the contract is treated as still subsisting and where it is treated as at an end. Now the plaintiff might, if he had so elected, have treated the contract as at an end when the defendant announced his intention to break it. But that is a matter of election on the plaintiff's part, and even although he had elected thus to treat the contract, yet in considering the question of damages they would still be estimated with reference to the times at which the contract ought to have been performed, that is, in this case, at the end of the months of September, October, or November.

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The damages should therefore be assessed on the principle I have indicated, and the rule made absolute to reduce the damages to 109*l.* 4*s.*

MARTIN and CHANNELL, BB., delivered judgments to the same effect.

PAYZU, LIMITED v. SAUNDERS.

'In assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been or would have been diminished.'—Per Cockburn, C.J., in *Frost* v. *Knight* (1872) L. R. 7 Ex. at p. 115.

PAYZU, LIMITED *v.* SAUNDERS [1919] 2 K. B. 581

Action tried by McCardie J. without a jury.

By a contract in writing dated November 9, 1917, the defendant, who was a dealer in silk, agreed to sell to the plaintiffs 200 pieces of crêpe de chine at 4*s.* 6*d.* a yard and 200 pieces at 5*s.* 11*d.* a yard, 'delivery as required January to September, 1918; conditions, 2½ per cent. 1 month,' which meant that payment for goods delivered up to the twentieth day of any month should be made on the twentieth day of the following month, subject to 2½ per cent. discount. At the request of the plaintiffs the defendant delivered, in November, 1917, a certain quantity of the goods under the contract, the price of which amounted to 76*l.*, less 2½ per cent. discount. On December 21 the plaintiffs drew a cheque in favour of the defendant in payment of these goods, but the cheque was never received by the defendant. Early in January, 1918, the defendant telephoned to the plaintiffs asking why she had not received a cheque. The plaintiffs then drew another cheque, but owing to a delay in obtaining the signature of one of the plaintiffs' directors, this cheque was not sent to the defendant until January 16. On that day the plaintiffs gave an order by telephone for further deliveries under the contract. The defendant in the belief, which was in fact erroneous, that the plaintiffs' financial position was such that they could not have met the cheque which they alleged had been drawn in December,

wrote to the plaintiffs on January 16 refusing to make any further deliveries under the contract unless the plaintiffs paid cash with each order. The plaintiffs refused to do this, and after some further correspondence brought this action claiming damages for breach of contract. The damages claimed were the difference between the market prices in the middle of February, 1918, and the contract prices of the two classes of goods, the difference alleged being respectively 1*s.* 3*d.* and 1*s.* 4*d.* a yard.

[McCardie J. gave judgment for the plaintiffs for £50 damages.]

The plaintiffs appealed on the question of damages.

BANKES, L.J.—At the trial of this case the defendant, the present respondent, raised two points: first, that she had committed no breach of the contract of sale, and secondly that, if there was a breach, yet she had offered and was always ready and willing to supply the pieces of silk, the subject of the contract, at the contract price for cash; that it was unreasonable on the part of the appellants not to accept that offer, and that therefore they cannot claim damages beyond what they would have lost by paying cash with each order instead of having a month's credit and a discount of 2½ per cent. We must take it that this was the offer made by the respondent. The case was fought and the learned judge has given judgment upon that footing. It is true that the correspondence suggests that the respondent was at one time claiming an increased price. But in this Court it must be taken that the offer was to supply the contract goods at the contract price except that payment was to be by cash instead of being on credit.

In these circumstances the only question is whether the appellants can establish that as matter of law they were not bound to consider any offer made by the respondent because of the attitude she had taken up. Upon this point McCardie J. referred to *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London* ([1912] A. C. 673, 689), where Lord Haldane L.C. said: 'The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars

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him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co.* v. *Lever* ((1878) 9 Ch. D. 20, 25) : " What the plaintiffs are entitled to is the full amount of the damage which they have really sustained by a breach of the contract. The person who has broken the contract not being exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business." ' It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case. There may be cases where as matter of fact it would be unreasonable to expect a plaintiff to consider any offer made in view of the treatment he has received from the defendant. If he had been rendering personal services and had been dismissed after being accused in presence of others of being a thief, and if after that his employer had offered to take him back into his service, most persons would think he was justified in refusing the offer, and that it would be unreasonable to ask him in this way to mitigate the damages in an action of wrongful dismissal. But that is not to state a principle of law, but a conclusion of fact to be arrived at on a consideration of all the circumstances of the case. Mr. Matthews complained that the respondent had treated his clients so badly that it would be unreasonable to expect them to listen to any proposition she might make. I do not agree. In my view each party was ready to accuse the other of conduct unworthy of a high commercial reputation, and there was nothing to justify the appellants in refusing to consider the respondent's offer. I think the learned judge came to a proper conclusion on the facts, and that the appeal must be dismissed.

SCRUTTON, L.J. and EVE, J. delivered judgments to the same effect.

'The criterion of whether a sum—be it called penalty or damages—is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or can not be regarded as a "genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation". The indicia of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made.'—Per Lord Dunedin in *Public Works Commissioner* v. *Hills* [1906] A. C. at p. 375.

DUNLOP PNEUMATIC TYRE CO. LTD. *v.* NEW GARAGE AND MOTOR CO. LTD. [1915] A. C. 79

LORD DUNEDIN.—My Lords, the appellants, through an agent, entered into a contract with the respondents under which they supplied them with their goods, which consisted mainly of motor-tyre covers and tubes. By this contract, in respect of certain concessions as to discounts, the respondents bound themselves not to do several things, which may be shortly set forth as follows: not to tamper with the manufacturers' marks; not to sell to any private customer or co-operative society at prices less than the current price list issued by the Dunlop Company; not to supply to persons whose supplies the Dunlop Company had decided to suspend; not to exhibit or to export without the Dunlop Company's assent. Finally, the agreement concluded (clause 5), 'We agree to pay to the Dunlop Pneumatic Tyre Company, Ltd. the sum of 5*l.* for each and every tyre, cover or tube sold or offered in breach of this agreement, as and by way of liquidated damages and not as a penalty.'

The appellants, having discovered that the respondents had sold covers and tubes at under the current list price, raised action and demanded damages. The case was tried and the breach in fact held proved. An inquiry was directed before the Master as to damages. The Master inquired, and assessed the damages at 250*l.*, adding this explanation: 'I find that it was left open to me to decide whether the 5*l.* fixed in the agreement was penalty or liquidated damages. I find that it was liquidated damages.'

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Lord Dunedin.

The respondents appealed to the Court of Appeal, when the majority of that Court, Vaughan Williams and Swinfen Eady L.JJ., held, Kennedy L.J. dissenting, that the said sum of 5*l.* was a penalty, and entered judgment for the plaintiffs for the sum of 2*l.* as nominal damages. Appeal from that decision is now before your Lordships' House.

My Lords, we had the benefit of a full and satisfactory argument, and a citation of the very numerous cases which have been decided on this branch of the law. The matter has been handled, and at no distant date, in the Courts of highest resort. I particularly refer to the *Clydebank Case* ([1905] A. C. 6) in your Lordships' House and the cases of *Public Works Commissioner* v. *Hills* ([1906] A. C. 368) and *Webster* v. *Bosanquet* ([1912] A. C. 394) in the Privy Council. In both of these cases many of the previous cases were considered. In view of that fact, and of the number of the authorities available, I do not think it advisable to attempt any detailed review of the various cases, but I shall content myself with stating succinctly the various propositions which I think are deducible from the decisions which rank as authoritative :—

1. Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.

2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (*Clydebank Engineering and Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda* ([1905] A. C. 6)).

3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach (*Public Works Commissioner* v. *Hills* ([1906] A. C. 368) and *Webster* v. *Bosanquet* ([1912] A. C. 394)).

4. To assist this task of construction various tests have been

suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are :

(*a*) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in *Clydebank Case* ([1905] A. C. 6)).

(*b*) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (*Kemble* v. *Farren* (6 Bing. 141)). This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A. promised to pay B. a sum of money on a certain day and did not do so, B. could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable,—a subject which much exercised Jessel M.R. in *Wallis* v. *Smith* (21 Ch. D. 243)—is probably more interesting than material.

(*c*) There is a presumption (but no more) that it is penalty when ' a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage ' (Lord Watson in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (11 App. Cas. 332)).

On the other hand :

(*d*) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties (*Clydebank Case*, Lord Halsbury ([1905] A. C. at p. 11) ; *Webster* v. *Bosanquet*, Lord Mersey ([1912] A. C. at p. 398)).

Turning now to the facts of the case, it is evident that the damage apprehended by the appellants owing to the breaking of the agreement was an indirect and not a direct damage. So long as they got their price from the respondents for each article sold,

DUNLOP PNEUMATIC TYRE CO., LTD. v. NEW GARAGE AND MOTOR CO., LTD. — Lord Dunedin.

it could not matter to them directly what the respondents did with it. Indirectly it did. Accordingly, the agreement is headed 'Price Maintenance Agreement,' and the way in which the appellants would be damaged if prices were cut is clearly explained in evidence by Mr. Baisley, and no successful attempt is made to controvert that evidence. But though damage as a whole from such a practice would be certain, yet damage from any one sale would be impossible to forecast. It is just, therefore, one of those cases where it seems quite reasonable for parties to contract that they should estimate that damage at a certain figure, and provided that figure is not extravagant there would seem no reason to suspect that it is not truly a bargain to assess damages, but rather a penalty to be held in terrorem.

The argument of the respondents was really based on two heads. They overpressed, in my judgment, the dictum of Lord Watson in *Lord Elphinstone's Case* (11 App. Cas. 332, at p. 342), reading it as if he had said that the matter was conclusive, instead of saying, as he did, that it raised a presumption, and they relied strongly on the case of *Willson* v. *Love* ([1896] 1 Q. B. 626).

Now, in the first place, I have considerable doubt whether the stipulated payment here can fairly be said to deal with breaches, 'some of which'—I am quoting Lord Watson's words —'may occasion serious and others but trifling damage.' As a mere matter of construction, I doubt whether clause 5 applies to anything but sales below price. But I will assume that it does. None the less the mischief, as I have already pointed out, is an indirect mischief, and I see no data on which, as a matter of construction, I could settle in my own mind that the indirect damage from selling a cover would differ in magnitude from the indirect damage from selling a tube; or that the indirect damage from a cutting-price sale would differ from the indirect damage from supply at a full price to a hostile, because prohibited, agent. You cannot weigh such things in a chemical balance. The character of the agricultural land which was ruined by slag heaps in *Elphinstone's Case* (11 App. Cas. 332) was not all the same, but no objection was raised by Lord Watson to applying an overhead rate per acre, the sum not being in itself unconscionable.

I think *Elphinstone's Case* (11 App. Cas. 332), or rather the

dicta in it, do go this length, that if there are various breaches to which one indiscriminate sum to be paid in breach is applied, then the strength of the chain must be taken at its weakest link. If you can clearly see that the loss on one particular breach could never amount to the stipulated sum, then you may come to the conclusion that the sum is penalty. But further than this it does not go; so, for the reasons already stated, I do not think the present case forms an instance of what I have just expressed.

As regards *Willson's Case* ([1896] 1 Q. B. 626), I do not think it material to consider whether it was well decided on the facts. For it was decided on the view of the facts that the manurial value of straw and of hay were known ascertainable quantities as at the time of the bargain, and radically different, so that the damage resulting from the want of one could never be the same as the damage resulting from the want of the other.

Added to that, the parties there had said 'penalty,' and the effort was to make out that that really meant liquidated damages; and lastly, if my view of the facts in the present case is correct, then Rigby L.J. would have agreed with me, for the last words of his judgment are as follows: 'On the other hand it is stated that, when the damages caused by a breach of contract are incapable of being ascertained, the sum made by the contract payable on such a breach is to be regarded as liquidated damages. The question arises, What is meant in this statement by the expression "incapable of being ascertained"? In their proper sense the words appear to refer to a case where no rule or measure of damages is available for the guidance of a jury as to the amount of the damages, and a judge would have to tell them they must fix the amount as best they can.' To arrive at the indirect damage in this case, supposing no sum had been stipulated, that is just what a judge would, in my opinion, have had to do.

On the whole matter, therefore, I go with the opinion of Kennedy L.J., and I move your Lordships that the appeal be allowed, and judgment given for the sum as brought out by the Master, the appellants to have their costs in this House and in the Courts below.

LORDS ATKINSON, PARKER, and PARMOOR agreed.

RYAN v. MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION.

'The Court gives specific performance instead of damages only when it can by that means do more perfect and complete justice. An agreement, which is not so specific in its terms or in its nature as to make it certain that better justice will be done by attempting specifically to perform it than by leaving the parties to their remedy in damages, is not one which the Court will specifically perform.'—Per Lord Selborne, L.C., in *Wilson* v. *Northampton and Banbury Junction Railway Co.* (1874) L. R. 9 Ch. at p. 284.

RYAN *v.* MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION [1893] 1 Ch. 116

Appeal from the judgment of Mr. Justice *A. L. Smith*, sitting for Mr. Justice *Romer* ([1892] 1 Ch. 427).

The action was brought upon a covenant in a lease, by which the Defendants demised to the Plaintiff for twenty-one years a residential flat in a building known as *Westminster Chambers*, which was let in flats to several tenants. The covenant sued upon was as follows: 'It is hereby agreed and declared by and between the parties hereto that the premises hereinbefore expressed to be hereby demised are taken by the lessee subject to the regulations made by the lessors with respect to the duties of the resident porter, and other matters for the general convenience of tenants. These regulations are set forth in the schedule hereunder written, and are to be considered as forming part of these presents. The lessors, however, reserve to themselves the right of altering and modifying the regulations (except in the case of the present lessee as to the supply of coal) from time to time as the convenience of the tenants or other special circumstances may render desirable.' The schedule was, so far as material, as follows: '(1.) The property of the lessors is divided into seven distinct blocks, each having an entrance into *Victoria Street*, and the rooms in each block are, together with the entrance and staircase belonging to it, in charge of a resident porter appointed and removable by the lessors, but who shall be and act as the servant of the tenants of the several rooms in the block. (3.) Tenants have the right to the general services of the porter resident in their block within the scope of his general duties, as defined by rule 6. (4.) Tenants have the right to the special services of such porter, as defined by rules 8, 9, and 10. (6.) The general duties of the porter which the tenants are entitled

to have performed for them free of extra charge are as follows: (*a.*) To be constantly in attendance in the section of the building committed to his charge, either by himself or, in his temporary absence, by some trustworthy assistant. (*b.*) To cleanse every morning before 9 o'clock A. M. the general stairs, passages, lifts, and entrances attached to the section, and to attend to the lighting and extinguishing of the gas therein. (*c.*) To receive and deliver to the several tenants all letters, parcels, and messages, and to receive the keys of the outer doors of the several sets of rooms from the tenants for safe custody, on their leaving for the night. (8.) The special services of the porter, which he is bound to render to the several tenants, if required, at a charge of 1*s.* 6*d.* per week for each room, comprise the cleaning and arrangement of such room, and the lighting of the several fires whenever required. (9.) Any extra services required of the porter by the tenants, and which are not inconsistent with his general duties, are to be the subject of special arrangement between them. (10.) Any services rendered by the porter will be rendered by him as the servant of the tenant, and for which, or the consequences whereof, the lessors will not be responsible.'

The action was commenced on the 24th of December, 1890. The statement of claim alleged that since the date of the lease the Plaintiff had occupied the demised premises and paid his rent and performed his covenants, but that the Defendants had omitted and refused to appoint a resident porter to take charge of the block in which the Plaintiff's premises were situate, to be and act as the Plaintiff's servant according to the regulations in the schedule. The Plaintiff also alleged that a porter had been appointed by the Defendants, but that such porter was not constantly in attendance in the section of the building committed to his charge, either by himself or, in his temporary absence, by some trustworthy assistant, and that such porter had wilfully and persistently omitted and neglected to attend on the Plaintiff according to the said regulations, and to receive and deliver to the Plaintiff all letters, parcels, and messages; and that such porter had not been available when required for the Plaintiff to arrange with him for any extra services not inconsistent with his general duties. The Plaintiff claimed—(1.) an injunction against the Defendants to restrain them from employing as the porter in

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charge of the said block any person who is not resident and constantly in attendance therein, and able and willing to act as the servant of the Plaintiff, according to the regulations contained in the said schedule; (2.) specific performance of the agreement to appoint a resident porter in charge of the said block; (3.) £100 damages for breaches of covenant.

The facts proved at the trial with regard to the alleged breach of covenant were as follows: The Plaintiff became lessee of the flat as from midsummer, 1889. There was only one other residential set of chambers in the block besides that of the Plaintiff; but there were several sets of business chambers in such block. In 1887 a man named *Benton* was appointed to the situation of porter, who, with his wife, resided on the premises. *Benton* was by avocation a cook, and at that time was acting as *chef* at a City hotel or restaurant, and continued so to act till July, 1889. From November, 1890, till August, 1891, he had, at the instance of the directors of the Defendant company, been employed from 11 A. M. to 3 P. M. on weekdays at a luncheon club at 3, *Victoria Street, Westminster*. He was at home on Sundays; but on that day an old woman usually acted for him in his duties as porter; and he was backwards and forwards on weekdays. He had the assistance of a lad in the performance of his duties, who, however, did not reside on the premises. It was proved by the Plaintiff and his witnesses that *Benton* rarely acted as porter; that the door was occasionally opened by his wife, or niece, or by a charwoman, but usually by a boy in his shirt-sleeves, and wearing an apron; and that boys and charwomen were the persons who really performed the duties assigned by the regulations to the porter.

The learned Judge gave judgment for the Plaintiff, concluding in these terms ([1892] 1 Ch. 433): 'My judgment is, that the Defendants appoint a resident male porter pursuant to the covenant. I will grant an injunction, or decree specific performance of the covenant, if that is the more appropriate course; and in case it is held in the Court of Appeal that I ought not to have done so, I assess the damages down to date of action brought at £25.' The judgment of the Court as drawn up between the parties was: (1.) The Court doth order that the Defendants be restrained from employing as a porter in charge of the block No. 7, *Victoria Street*, any

person who is not resident and constantly in attendance therein, and able and willing to act as the servant of the Plaintiff according to the regulations contained or referred to in the lease. (2.) The Court doth declare that the agreement contained or referred to in the lease to appoint a resident porter in charge of the said block, ought to be specifically performed, and doth order and adjudge the same accordingly.

KAY, L.J. This remedy by specific performance was invented, and has been cautiously applied, in order to meet cases where the ordinary remedy by an action for damages is not an adequate compensation for breach of contract. The jurisdiction to compel specific performance has always been treated as discretionary, and confined within well-known rules. In this case the Plaintiff is the lessee of a flat, which forms portion of a large building. In the lease is a covenant to the effect that the premises are taken by the lessee subject to certain regulations made by the lessors with respect to the duties of the resident porter and other matters, which are set out in a schedule. By the schedule it is stated that the building is divided into blocks, and the rooms in each block are, together with the entrance and staircase belonging to it, in charge of a resident porter, appointed and removable by the lessors, but who shall be and act as the servant of the tenants of the several rooms in the block. The tenants are to have the right to the general services of the porter resident in their block within the scope of his general duties, as defined by rule 6. They are also to have the right to the special services of such porter, as defined by rules 8, 9, and 10. The Plaintiff's right under this covenant appears to me to be to have the advantage of the performance of the specified duties by the resident porter. In this case a man was appointed as porter, and held office; the complaint really was that he was not a proper porter, and that the tenant did not get the advantage of the services stipulated for in the schedule; that he was not constantly in attendance; but, being engaged elsewhere, was not on the premises as much as he should be; and that, when he was there, he did not perform his duties himself. When one looks at that which was the real gravamen of the action, the contention seems rather odd that we ought to divide the contract into two

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parts—one that a porter should be appointed, the other that he should perform the duties specified. The lessors' covenant being in substance that the lessee should have the advantage of the performance of certain services by the porter, a covenant which I cannot conceive to be divisible, as was ingeniously suggested, the Plaintiff's claim is shaped thus. It is alleged that the lessee took possession under the lease, but that a proper porter was not appointed, and the lessee does not get the advantage of the performance of the porter's duties. He therefore asks for some remedy by means of which he may have these duties performed. That is really the nature of the action. But now it is sought to overlook that, and to say that, though a contract that the lessee shall have the benefit of the performance by the porter of his duties is not the sort of contract of which the Plaintiff can have specific performance, yet he can claim to have the contract performed specifically to this extent: he can ask the Court to compel the appointment of a proper porter, though, when he is appointed, the Court is not asked to compel performance of his duties. As I have said, the contract is really a single contract —viz., that the Plaintiff shall have the advantage of performance by the porter of his duties; and I dissent entirely from the notion that this contract can be divided into two parts in the way suggested, and the Court asked to grant specific performance of one part, but not of the other.

There are, no doubt, certain cases where a contract may be treated as divisible for the purpose of specific performance. The common case is where there is a contract like that in *Lumley* v. *Wagner* (1 D. M. & G. 604); in which case the contract was to sing for the plaintiff, and also not to sing for others. The Court says in such cases, though we cannot enforce performance of the contract to sing for a particular person, and so cannot enforce the whole contract; nevertheless, there being the independent negative stipulation against singing for others, we can enforce that by injunction. In the case of *Lumley* v. *Wagner*, the Lord Chancellor, in the passage which I cited in *Whitwood Chemical Company* v. *Hardman* ([1891] 2 Ch. 416), expressly said that, if he had had to deal with the affirmative covenant only, that the defendant would sing for the plaintiff, he would not have granted an injunction. That is one exception to the rule.

There is another exception to the general rules as to specific performance. Ordinarily the Court will not enforce specific performance of works, such as building works, the prosecution of which the Court cannot superintend; not only on the ground that damages are generally in such cases an adequate remedy, but also on the ground of the inability of the Court to see that the work is carried out: *Blackett* v. *Bates* (Law Rep. 1 Ch. 124); *Powell Duffryn Steam Coal Company* v. *Taff Vale Railway Company* (Law Rep. 9 Ch. 331). An exception to this rule has been established in cases where a railway company has taken lands from a landowner on the terms that it will carry out certain works. In those cases, because damages are not an adequate remedy, the Court has gone to great lengths, and has granted specific performance of the definite works—they must be definite works—which the company that has taken the lands has contracted to do. This case does not come within either of the exceptions to which I have alluded. Therefore, for the reasons stated by the Master of the Rolls, this case is not one in which the Court could compel specific performance.

There appears to me to be also another reason for our decision which is quite sufficient. At the time when the action was brought there had been a breach of covenant. The learned Judge found no difficulty in assessing damages for breach of the contract down to that time. Why should there be any difficulty with regard to future breaches of contract? I have heard no sufficient reason adduced in the argument. If for the breach of contract down to action brought adequate compensation may be given by damages, that appears to me to be a reason for the Court not exercising its extraordinary jurisdiction. A sufficient reply to this argument is not afforded by the mere fact that these damages are not compensation for future breaches of the contract. If that were sufficient, I cannot conceive of any case of a continuing contract where specific performance might not be granted. For these reasons I differ respectfully from the learned Judge, and think that nothing but a judgment for the damages found by him should be given.

Lord Esher, M.R, and Lopes, L.J., delivered judgments to the same effect.

Appeal allowed.

DEBENHAM v. MELLON.

'Where a plaintiff seeks to charge a husband on a contract made by his wife, the question is, whether the wife had his authority, express or implied, to make the contract; if there be express authority, there is no room for doubt, and if the authority is to be implied, the presumptions which may be advanced on one side may be rebutted on the other; and although there is a presumption that a woman living with a man, and represented by him to be his wife, has his authority to bind him by her contract for articles suitable to that station which he permits her to assume, still this presumption is always open to be rebutted.'—Per Erle, C.J., in *Jolly* v. *Rees* (1864) 15 C. B. (N. S.) at p. 639.

'Our decision does not militate against the rule that the husband, as well as every principal, is concluded from denying that the agent had such authority as he was held out by his principal to have, in such a manner as to raise a belief in such authority, acted on in making the contract sought to be enforced. Such liability is not founded on any rights peculiar to the conjugal relation, but on a much wider ground.'—Ibid. at p. 640.

DEBENHAM *v.* MELLON (1880) 6 App. Cas. 24

APPEAL against a decision of the Court of Appeal which had affirmed a judgment of the Queen's Bench Division upon a ruling of Mr. Justice *Bowen*.

The Appellants brought an action against the Defendant for the price of goods supplied to his wife. The statement of claim described the goods as sold and delivered to the Defendant, ordered for him by his wife as his duly authorized agent in that behalf.

The defence denied that the goods were ordered by the Defendant's wife as his agent, alleged that his wife was not his agent in that behalf, and had no authority express or implied to pledge his credit for the goods, as the Plaintiffs knew or ought to have known. Issue thereon.

The cause was tried in *London* before Mr. Justice *Bowen* and a jury. The Plaintiffs were drapers in *London*—the goods were admitted to be necessaries suitable for the condition of the wife, and the prices were admitted to be reasonable. It appeared from the evidence offered by the Defendant, that, by an arrangement

between the husband and wife he was to furnish her with £52 a year (on some occasions increased to £62) with which she was to supply herself and their children with clothes, and that he had positively forbidden her to exceed that allowance. The husband and wife were employed as manager and manageress of the hotel of a (limited) company, first in *Devonshire* and then at *Bradford*. They lived together in the ordinary way. The question left by the Judge to the jury was whether at the time when the goods were ordered, the Defendant had withdrawn from his wife authority to pledge his credit, and had forbidden her to do so. This question was answered in the affirmative, whereupon judgment was ordered to be entered for the Defendant. The Queen's Bench Division refused a new trial.

The Plaintiffs appealed, and the case was heard before Lords Justices *Bramwell*, *Baggallay*, and *Thesiger*, who, following and adopting the decision in *Jolly* v. *Rees* (15 C. B. (N.S.) 628; 33 L. J. (C.P.) 177), affirmed the ruling in the Court below (5 Q. B. D. 394).

[The judgment of Thesiger, L.J., in the Court of Appeal (5 Q. B. D. 401) is here inserted.]

THESIGER, L.J.—The state of facts upon which the judgment of the Court is to proceed I take to be as follows: a husband and wife living together: the husband able and willing to supply the wife with necessaries, or the means of obtaining them: an agreement between them, not made public in any way, that the wife shall not pledge her husband's credit: a tradesman, without notice of that agreement, and without having had any previous dealings with the wife with the husband's assent, supplying her, upon the credit of the husband, but without his knowledge or assent, with articles of female attire suitable to her station in life: an action brought against the husband for the price of such articles.

The question for us is whether the action is maintainable. I agree with the other members of the Court, and with Bowen, J., that it is not. The appellants' counsel have brought under our notice a considerable number of authorities with the view of establishing that the law as laid down in *Jolly* v. *Rees* (15 C. B. (N.S.) 628; 33 L. J. (C.P.) 177) is erroneous. I think that the

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authorities have a contrary effect. They establish beyond controversy that the liability of a husband for debts incurred by his wife during cohabitation is based in the main upon the ordinary principles of agency. It follows that he is only liable when he has expressly or impliedly, by prior mandate or subsequent ratification, authorized her to pledge his credit or has so conducted himself as to make it inequitable for him to deny, or to estop him from denying, her authority. In the present case express authority is out of the question, and there is no evidence that the defendant ever assented in any way to the act of his wife in pledging his credit to the plaintiffs.

But it is said that there is a presumption that a wife living with her husband is authorized to pledge her husband's credit for necessaries ; that the goods supplied by the plaintiffs were, as it is admitted they were, necessaries ; and that, as a consequence, an implied authority is established. This contention is founded upon an erroneous view of what is meant by the term 'presumption' in cases where it has been used with reference to a wife's authority to pledge her husband's credit for necessaries. There is a presumption that she has such authority in the sense that a tradesman supplying her with necessaries upon her husband's credit and suing him, makes out a primâ facie case against him, upon proof of that fact and of the cohabitation. But this is a mere presumption of fact founded upon the supposition that wives cohabiting with their husbands ordinarily have authority to manage in their own way certain departments of the household expenditure, and to pledge their husbands' credit in respect of matters coming within those departments. Such a presumption or primâ facie case is rebuttable, and is rebutted when it is proved in the particular case, as here, that the wife has not that authority. If this were not so, the principles of agency, upon which, ex hypothesi, the liability of the husband is founded, would be practically of no effect.

Feeling this difficulty the appellants' counsel shift their ground, and contend that, although under the circumstances of this case the wife may have had no authority in fact or in law to pledge her husband's credit, yet the defendant must be taken to have held out his wife as having authority to pledge his credit to all persons supplying her with necessaries without notice that she

had not authority in fact, and consequently is estopped as between him and the plaintiffs from denying her authority. DEBENHAM v. MELLON.

This contention appears to me to have no better ground of support than the one with which I have just dealt. If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demur in respect of such dealings, the tradesman has a right to assume, in the absence of notice to the contrary, that the authority of the wife which the husband has recognised continues. The husband's quiescence is in such cases tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume; just as it would forbid his denying the authority of a servant who had been in the habit of ordering goods for him from the tradesman, and whose authority he had secretly revoked. But what, in the case of a tradesman dealing with his wife without his knowledge or assent, has the husband done or omitted to do, which renders it inequitable for him to deny his wife's authority? For the tradesman it is said that the mere relationship of husband and wife entitles him to assume, in the absence of notice to the contrary, that the wife has authority to pledge her husband's credit for necessaries. But this is a fallacy. The tradesman must be taken to know the law; he knows (for the present argument proceeds upon that supposition) that the wife has no authority in fact or in law to pledge the husband's credit even for necessaries, unless he expressly or impliedly gives it her, and that what the husband gives he may take away. How, then, can the tradesman dealing with the wife, without any communication with or knowledge on the part of the husband, say that he is induced or invited by the husband to deal with the wife upon the faith and in the belief of her being in fact authorized to pledge her husband's credit? If he be so induced or invited, it can only be upon the footing of the law making a husband absolutely liable for necessaries purchased by his wife to any person dealing with her, although for the first time, without notice that her authority is limited; but if the law does so make him liable, there is no need for any estoppel, and we are driven back upon the exploded notion that the husband's liability is founded entirely upon some law other than that which governs in general the relations of principal and agent. Thesiger, L.J.

DEBENHAM v. MELLON. — Thesiger, L.J.

It is urged that it is hard to throw upon a tradesman the burden of inquiring into the fact of a wife's authority to buy necessaries upon her husband's credit. I assent to the answer that while the tradesman has at least the power to inquire or to forbear from giving credit, it is still harder, and is contrary if not to public policy yet to general principles of justice, to cast upon a husband the burden of debts which he has no power to control at all except by a public advertisement that his wife is not to be trusted, and in respect to which even after such advertisement he may be made liable to a tradesman who is able to swear that he never saw it.

It appears to me that the decision of the majority of the judges in the case of *Jolly* v. *Rees* (15 C. B. (N.S.) 628; 33 L. J. (C.P.) 177) has put the law as regards this matter upon a proper footing, and that there is no ground for disturbing the judgment in this case which the defendant has obtained.

This appeal was then brought.

THE LORD CHANCELLOR (Lord *Selborne*).—My Lords, you are asked in this case to review the decision of the Court of Common Pleas in 1864, in *Jolly* v. *Rees* (15 C. B. (N.S.) 628; 33 L. J. (C.P.) 177), the correctness of which, as far as I know, has not been seriously controverted since that time.

The point determined was one of much importance; namely, that the question, whether a wife has authority to pledge her husband's credit, is to be treated as one of fact, upon the circumstances of each particular case, whatever may be the presumption arising from any particular state of circumstances.

That principle is now controverted; and the first question before your Lordships is, whether the mere fact of marriage implies a mandate by law, making the wife (who cannot herself contract, unless so far as she may have separate estate) the agent in law of her husband, to bind him, and to pledge his credit, by what otherwise would have been her own contract, if she had been a *feme sole*? On that point, I think it enough to say, that, according to all the authorities, there is no such mandate in law from the fact of marriage only, except in the particular case of necessity; a necessity which may arise, when the husband has deserted the wife, or has by his conduct compelled her to live

apart from him, without properly providing for her,—but not when the husband and wife are living together, and when the wife is properly maintained; because there is, in that state of circumstances, no *primâ facie* evidence that the husband is neglecting to discharge his necessary duty, or that there is any necessary occasion for the wife to run him into debt, for the purpose of keeping herself alive, or supplying herself with lodging or clothing.

I therefore lay aside that proposition; and, thinking it clear, that there is no mandate in law by the mere fact of marriage applicable to such a state of circumstances as we have at present to consider, I pass to the next question; whether the law implies a mandate to the wife, from the fact, not of marriage, but of cohabitation? If it does, on what principle? Cohabitation is not (like marriage), a *status*, or a new contract; it is a general expression for a certain condition of facts. If, therefore, the law did imply any such mandate from cohabitation, it must be as an implication of fact, and not as a conclusion of law. There are, no doubt, various authorities, which shew that the ordinary state of cohabitation between husband and wife does carry with it some presumption, some *primâ facie* evidence, of an authority to do those things, which, in such ordinary circumstances of cohabitation, it is usual for a wife to do. Mr. *Benjamin* says, that those words are not the best which might be used for the purpose; but that 'apparent authority,' or 'ostensible authority,' would be better. I am not at all sure that Mr. *Benjamin's* words may not be very good words, for that ordinary state of circumstances, in the case of cohabitation between husband and wife, out of which the ordinary presumption arises; because, in that state of circumstances, the husband may truly be said to do acts, or habitually to consent to acts, which hold the wife out as his agent for certain purposes. Then, the word 'apparent,' or the word 'ostensible,' becomes appropriate. But where there has been nothing done, nothing consented to, by the husband, to justify the proposition that he has ever held out the wife as his agent, I apprehend that the question whether, as a matter of fact, he has given the wife authority, must be examined upon the whole circumstances of the case. No doubt, though not intending to hold her out as his agent, and though she may not actually have had authority, the husband may have so conducted himself as to

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entitle a tradesman dealing with her to rely upon some appearance of authority for which the husband ought to be held responsible. If he has so acted he may be bound; but the question must be examined as one of fact, and all the authorities, as I understand them, practically treat it so when they speak of this as a presumption *primâ facie*, and not absolute; not a presumption of law, but one capable of being rebutted. When Chief Baron *Pollock*, in *Johnston* v. *Sumner* (3 H. & N. at p. 268), said, that all the usual authorities of a wife under those circumstances might be assumed, 'notwithstanding any private arrangement,' I suppose him to have had in view that state of facts, under cohabitation, when a wife is managing her husband's house and establishment, which usually raises the presumption. If an appearance of authority is once, in fact, created by the husband's acts, or by his assent to the acts of his wife, it may be right to hold, that, as between the husband and a person relying upon that appearance of authority, it cannot be got rid of by a mere private understanding or agreement between the husband and wife. The same learned Judge in another case which was cited during the argument, viz., *Reneaux* v. *Teakle* (8 Ex. at p. 682) said, that the case of the wife, in principle at all events, was not different from that of anybody else at the head of an establishment. If there is an establishment of which there is a domestic manager, although the wife may be the most natural domestic manager, and though the presumption may be strongest when she is so, yet the same presumption may, and often does, arise from similar facts, when the actual manager is not a wife, but merely a woman living with a man, and passing as his companion, with or without the assumption of the name of wife. It is also the same when the person to whom the domestic management is delegated is a housekeeper or a steward, or any other kind of superior servant. Therefore it is, in all these cases, really a mere question of fact.

Now, my Lords, in the present case, that ordinary state of circumstances which usually accompanies cohabitation where there is a house and an establishment, is entirely wanting. There was here no house, no establishment; none of those things was done, in the way of living upon credit, to provide for the ordinary and daily wants of a family or an establishment, which commonly raise the presumption. The husband and wife were both servants

of a company of hotel keepers at *Bradford*. They lived in the hotel, which belonged to their employers ; their whole board and lodging (which I take, upon the evidence, to have included that of their children) being found for them by the company ; and therefore there was, in point of fact, no domestic management at all. The credit, such as it was, was given by a *London* tradesman to a woman living in *Bradford* in these circumstances. No single act is shewn to have been done by him upon the faith of any appearance of authority in the wife ; he made out all the bills to the wife in her own name. This, no doubt, would not have prevented him from recovering against the husband, if the husband was otherwise liable, but it certainly does not tend to shew that he supposed he was giving credit to the husband ; much less that he was misled into doing so by any conduct of the husband. That the husband never knew any of these things is perfectly clear. The necessary conclusion of fact is, that the husband did not hold out his wife as having any authority, by any act, or by any course of conduct, either to the Plaintiff or to any other persons, of whose dealings the Plaintiff might be presumed to have cognizance.

Then, if the Plaintiff can recover at all, it can only be because there was, notwithstanding this state of things, an actual authority in point of fact. But the evidence conclusively shews, that there was no such authority. It is said, that, when this married pair lived, four or five years before the beginning of the dealings between the wife and the Plaintiffs (much more than that time before this particular debt was contracted), at *Westward-Ho* in *Devonshire*, there were some other people who did give credit to the husband, the wife then acting as his agent. That the Plaintiff ever heard of that is not so much as suggested. More than four years before any dealings with the Plaintiff began that state of things, being disapproved of by the husband, was put an end to. The husband at that time expressly determined and revoked any authority, which he might previously have given to the wife ; and he afterwards, at the time when this debt was contracted, was making her an annual allowance more than sufficient for any necessary purposes of her clothing, according to the state of their circumstances and condition in life. It is said that of that revocation the Plaintiff had no notice ; but the Plaintiff had no notice of the circumstances which made the revocation necessary, he

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never had notice of any single fact material to the question of authority, except that she was a married woman.

It was argued that, because these articles were found to be in some sense 'necessaries' in their nature, the husband ought therefore to be bound. But, even if the husband and wife had been living apart, the husband would not be bound by reason of such things being necessaries if he made a reasonable allowance to his wife and duly paid it: much less can he be bound in a case like this where they were not living apart, and when he made her an allowance sufficient to cover all proper expenditure for her own and her children's clothing.

These observations dispose of the whole case; but I must add, without going into the authorities, that if the principles which run through them from first to last are regarded (as they ought to be) rather than casual *dicta* coloured (as they necessarily must be) by the circumstances of particular cases, the whole of those authorities are really consistent with each other, and with the decision which was arrived at by the majority of the Court of Common Pleas in the case of *Jolly* v. *Rees* (15 C. B. (N.S.) 628; 33 L. J. (C.P.) 177).

Therefore, my Lords, I move your Lordships that this appeal be dismissed, and the judgment of the Court below affirmed.

LORDS BLACKBURN and WATSON agreed.

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'To constitute a binding adoption of acts a priori unauthorized these conditions must exist: (1) the acts must have been done for and in the name of the supposed principal, and (2) there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were.'—Per Lord Russell, C.J., in *Marsh* v. *Joseph* [1897] 1 Ch. at p. 246.

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[1900] 1 Q. B. 629

Application by the plaintiffs for a new trial in an action tried before Day J. and a jury.

The action was for non-acceptance of wheat sold by the plaintiffs to the defendants.

It appeared from the evidence for the plaintiffs that the defendants Keighley, Maxsted & Co. had through their manager authorized the defendant Roberts to purchase on joint account of himself and them 500 tons of red wheat at 44*s.* 3*d.* per quarter and 500 tons of white wheat at 45*s.* 3*d.* per quarter. Roberts being unable to effect the purchase of the wheat at those prices, without authority from Keighley, Maxsted & Co., bought from the plaintiffs 500 tons of red wheat at 44*s.* 6*d.* per quarter and 500 tons of white wheat at 45*s.* 6*d.* per quarter. He subsequently had an interview with Keighley, Maxsted & Co.'s manager, and informed him of the purchase, whereupon he said that Roberts had given too much, but he thought the wheats were worth it, and told him to take them. The contracts purported in the contract notes to be made between the plaintiffs and Roberts only, and it did not appear that Roberts mentioned any principals when making the contracts. It was contended for the plaintiffs that upon the evidence the proper inference was that Roberts had, when he made the contracts, intended to act on joint account of himself and Keighley, Maxsted & Co., and that the latter had subsequently ratified the contracts and were therefore liable upon them. Roberts had allowed judgment in the action to go against him by default. The learned judge held that, inasmuch as Roberts in making the contracts had not professed to act on behalf of any principal, there could be no ratification by Keighley, Maxsted & Co. of the contracts. He therefore directed a verdict and judgment for the defendants, Keighley, Maxsted & Co.

A. L. SMITH, L.J. read the following judgment:—The question in this case is whether a contract made by a principal with, what I will call, an unauthorized agent in the latter's name, which contract does not purport or profess to be made by the unauthorized agent on behalf of any one excepting himself, and as regards which contract he has not when he made it assumed to be acting on behalf of any one excepting himself, is capable of being ratified by a stranger, if it be shewn that the unauthorized agent had at the time he made the contract the undeclared intention in his own mind of making the contract for a person who had never authorized him to make it.

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It was said by the learned counsel for the appellants that this question had never been decided, and that the law was that, if an unauthorized agent—that is any one—had in his own mind, when he entered into a contract with another, the undeclared intention of making it on behalf of himself and of some other person, or of some other person alone, that other person could ratify the act of the unauthorized agent and thus become as if he had been a party to the contract ab initio. It struck me, when I heard this proposition put forward by the appellants' counsel (that is by the plaintiff's counsel), that it was not in accord with my recollection of the law; for I thought it had been long ago well engrained into the law of England that a stranger in such circumstances could not ratify; and, having had my memory refreshed at great length by the cases upon the subject, I find that my recollection has not played me false. It will be seen hereafter that very learned judges over and over again have stated the law as regards ratification to be that, unless the contract made by the unauthorized agent purports or professes (which in my judgment is the same thing) to have been entered into on behalf of another, or the unauthorized agent, when he made the contract, assumed to be making it on behalf of another, then the contract made by the unauthorized agent is not capable of being ratified by a stranger to it; for to be capable of being ratified the contract must purport or profess to have been entered into by the unauthorized agent on behalf of another, or the agent must have assumed by what he did when he entered into the contract to have been acting on behalf of some person who afterwards proposes to ratify. I find that every learned judge who has dealt with the question during the last three quarters of a century at least has affirmed the doctrine of ratification to be as above stated, with a most remarkable unanimity of opinion, and there is only one solitary instance to the contrary to be found in the books, namely, the judgment of Cockburn C.J. in the case of *Matheson* v. *Kilburn*,[1] which I will refer to hereafter, and in which Lord Cairns and Brett L.J. differed from the Lord Chief Justice, and, in my opinion, decided the point now raised in this case adversely to the appellants.

Before I deal with this consensus of judicial opinion I would

[1] Only reported in 1 Sm. L. C. 10th ed. p. 349.

point out that the learned junior counsel for the appellants, in order to meet this undeniable difficulty in his way, with a courage which distinguishes him, roundly asserted that the statements by the judges to be found in the books were mere obiter dicta, and should be discarded as worthless, and were not decisions upon the point. This struck me as remarkable. But I find that my brothers Collins and Romer are of opinion that this doctrine of ratification has never yet been decided, and they think that it is therefore necessary to begin ab ovo, and go back to the Roman law and other ancient works to try and ascertain what is or ought to be the law upon the subject, and to see whether what all the learned judges (with the one exception) have been saying throughout the last century is correct or not.

The point argued is that it is an anomaly that the law relating to contracts entered into by an unauthorized agent without any principal behind him should not be the same as that relating to contracts entered into by an authorized agent with an undisclosed principal behind him, and it is said that according to first principles the law should be the same as regards each. In my opinion, as I will hereafter point out, it is far too late to deal with this case upon such considerations ; and, indeed, it seems to me, if it were not so, that the law relating to authorized agents with undisclosed principals behind them is far more anomalous than that relating to unauthorized agents with no principals behind them ; and therefore the argument that the law should be held to be the same in each case does not appear to me to be of any weight, and I do not see why the law applicable to an unauthorized agent should be levelled down to that applicable to an authorized agent.

In my judgment to call the phalanx of judicial authority to which I must necessarily refer mere dicta is a misnomer altogether ; and I must point out that, with the exception of Cockburn C.J., the appellants cannot produce a single decision or even a dictum of a single judge in opposition to what they now call mere dicta, and which are all adverse to the appellants' contention.

I will now state how the present case arises. Roberts, one of the defendants, by contracts in writing in the months of

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April and May, 1898, purchased certain wheat of the plaintiffs. The only material part of those contracts as regards the point in hand is as follows: 'Bought of Messrs. Durant & Company, London . . . . for F. O. Roberts, Esq., Wakefield, five hundred tons of wheat. Signed, Burgett and Newson, Brokers.' The contract, it will be noticed, is made solely in the name of Roberts, so far as the buyer is concerned, and gives no intimation that it is made on any other person's behalf (which in fact it was not), nor did Roberts or the brokers assume that he or they were acting on any person's behalf excepting that of Roberts, when the contracts were made. Roberts having failed to take the wheat purchased by him, the plaintiffs, Durant & Co., thereupon sued him and also the firm of Keighley, Maxsted & Co. for damages for breach of their contracts. Roberts let judgment go by default, and the question is, Can the plaintiffs now make Keighley, Maxsted & Co. liable upon these contracts? It is admitted that Roberts had no authority whatever to enter into these contracts on behalf of Keighley, Maxsted & Co. He had no principal behind him whatever. Roberts says that in his own mind he intended, when he entered into the contracts, that they should be on joint account of himself and Keighley, Maxsted & Co.; in other words, he expected and hoped that Keighley, Maxsted & Co. would join him in the contracts after he had made them, as he in fact did, in his own name and on his own account.

To raise the point of law which has been argued before us, I will take it that Roberts is to be believed when he states what he expected and hoped Keighley, Maxsted & Co. would do after he (Roberts) had entered into the contracts with the plaintiffs, that is, take a joint venture in the wheat speculation, and there is evidence fit to be left to a jury that Keighley, Maxsted & Co. did afterwards desire to do so.

The question argued before us is this: In those circumstances are the contracts made by Roberts, not professing or purporting to be made for any one excepting himself, capable of being what is called ratified by Keighley, Maxsted & Co. so as to make them parties to the contracts made by Roberts, in which case the plaintiffs, Durant & Co., can sue Keighley, Maxsted & Co. upon those contracts, and they could sue Durant & Co. thereon?

To see how the law stands as to this, I will take the case of *Saunderson* v. *Griffiths* (5 B. & C. 909), decided over seventy years ago in the remarkable and unbroken sequence of authority which I am now coming to. There the question arose whether A., who was no party to the contract sued on, could take advantage of and sue upon the contract. The doctrine of ratification was resorted to on his behalf. The contract sued on purported to be made by an agent on behalf of B. and C., not of A. Holroyd J., when dealing with the doctrine of ratification, said (5 B. & C. at p. 915): 'It was said, however, that he' (A.) 'at a subsequent time assented to that agreement, and that such subsequent assent made it his agreement ab initio. There might have been some weight in that argument, if the agent at the time when he made the agreement had *professed* to have authority to act for the husband' (A.), 'because then the subsequent ratification would have been a recognition of the authority which the agent assumed to have when he made the agreement. But here the husband never previously authorized the agent to make the agreement on his behalf, nor is he named as a party for whom the latter *professed* to act.' It is said that this case is not in point, but I do not agree, for it shews that Holroyd J., when dealing with ratification, distinctly says that the argument as to ratification would have had weight if the agent had *professed* to act for A. at the time when he made the contract. In my judgment a man keeping an intention locked up in his own mind is not 'professing' to act for another when he makes the contract, and to hold otherwise would not, I think, be in accord with plain language. Many years afterwards, in *Bobbett* v. *Pinkett* ((1876) 1 Ex. D. 368, at p. 375), Amphlett B. expressly recognised what Holroyd J. had said in *Saunderson* v. *Griffiths* (5 B. & C. 909), saying: 'Suppose B., *professing* to act as A.'s agent, but in fact not authorized, enters into a contract with C.; would not A. by subsequently ratifying B.'s act be entitled to sue C. on the contract in his own name?' This is a dictum, but the learned Baron fully recognises the judgment of Holroyd J., which I think was no dictum at all, and again he lays stress upon the phrase 'professing to act.' In the year 1829, in the case of *Vere* v. *Ashby* (10 B. & C. 288), Parke J., afterwards Parke B., states the rule as to ratification thus. He says: 'The rule as to ratification

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applies only to the acts of one who *professes to act* as the agent of a person who afterwards ratifies. Here Rowland at the time when the first bill was discounted did not *profess* to act as the agent of Shaw.' I have already said what I think is the meaning of the word 'profess.' It does not describe an undeclared intention locked up in a man's own mind. The appellants' counsel may call this a dictum if he likes. In my judgment it is a deliberate declaration of a most learned judge as to what is the rule of ratification according to the law of England, and, as will be seen hereafter, is repeated by the learned judge when Lord Wensleydale in the House of Lords. In *Wilson* v. *Tumman* (6 M. & G. 236) in 1843 the question arose whether the defendant was liable for a seizure of the plaintiff's goods by the sheriff, and it was argued that, although the defendant had given no precedent authority to the sheriff to take the plaintiff's goods, yet he had ratified the taking after it was made. The sheriff when he took the plaintiff's goods did not purport to do so on behalf of Tumman, and Tindal C.J., in delivering the unanimous judgment of the Court of Common Pleas, said: 'The question, therefore, is a dry question of law, whether the subsequent ratification by this defendant of a taking under such circumstances is the same, in its consequences, as a precedent command of the defendant. And we think, under the authorities, and upon the reason of the thing itself, that it is not. That an act done, *for another*, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his *previous* authority.' The Chief Justice then cites the Year Book, 7 Hen. 4, and Godbolt's Reports, 109, and he adds: 'They (the sheriff's officers) did not *assume to act* at the time as agents or bailiffs of the then plaintiff Tumman.' The Court therefore held the defendant not liable. The appellants' counsel calls this a mere dictum of the Court of Common Pleas. He may say so, but I do not agree with him. Moreover, twenty years afterwards, in the year 1862,

in *Woollen* v. *Wright* (1 H. & C. 554) in the Exchequer Chamber, consisting of Wightman, Williams, Crompton, Willes, Byles, and Blackburn JJ., Wightman J., delivering the unanimous judgment of the Exchequer Chamber, expressly approved of the decision in *Wilson* v. *Tumman* (6 M. & G. 236), and stated that it had 'not been disputed until the present case.' In the year 1850 Rolfe B., when delivering the unanimous judgment of the Court of Exchequer in *Bird* v. *Brown* (4 Ex. 786), again dealt with the doctrine of ratification. He said: 'The doctrine "omnis ratihabitio retrotrahitur et mandato æquiparatur" is one intelligible in principle and easy in its application when applied to cases of contract. If A. B., unauthorized by me, makes a contract *on my behalf* with J. S., which I afterwards recognise and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be; .... In cases of tort, there is more difficulty. If A. B., *professing to act* by my authority, does that which primâ facie amounts to a trespass, and I afterwards assent to and adopt his act, there he is treated as having from the beginning acted by my authority, and I become a trespasser unless I can justify the act, which is to be deemed as having been done by my previous sanction. So far there is no difficulty in applying the doctrine of ratification even in cases of tort. .... But the authorities go much further and shew that in some cases where an act which, if unauthorized, would amount to a trespass, has been done *in the name and on behalf of another*, but without previous authority, the subsequent ratification may enable the party on whose behalf the act was done, to take advantage of it, and to treat it as having been done by his direction.' In the year 1857 Lord Wensleydale in the House of Lords in *Ridgway* v. *Wharton* (6 H. L. C. 238, at p. 296) said: 'If a man, *professing to act* for another, makes a contract for him, and authority is afterwards given by that other, the authority given subsequently is equal to authority given before according to the old maxim, "omnis ratihabitio retrotrahitur et mandato æquiparatur."' Here I find the learned judge as Lord Wensleydale reiterating in the House of Lords what as Parke J. he had

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declared eight and twenty years before to be the rule as to ratification in the case of *Vere* v. *Ashby* (10 B. & C. 288). Again in 1862 in *Watson* v. *Swann* (11 C. B. (N.S.) 756), which was an action upon a policy of insurance entered into by John Smith in his own name, Erle C.J. and Willes J. deal with ratification as follows. The Chief Justice says: 'It is clear law that no one can sue upon a contract unless it has been made by him or has been made by an agent *professing* to act for him, and whose act has been ratified by him.' (There was no question in that case nor in the present of an authorized agent acting for an undisclosed principal.) 'Now here the contract was not made by the plaintiff; nor did it purport to be made on his behalf: it *purported* to be made by Smith on his own behalf.' Willes J. said: 'To entitle a person to sue upon a contract, it must clearly be shewn that he himself made it, or that it was made *on his behalf* by an agent authorized to act for him at the time or whose act has been subsequently ratified and adopted by him. The law obviously requires that the person for whom the agent *professes* to act must be a person capable of being ascertained at the time. It is not necessary that he should be named; but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract.' In the same year 1862 in *Ancona* v. *Marks* (7 H. & N. 686), and apparently before the judgment in the Exchequer Chamber in *Woollen* v. *Wright* (1 H. & C. 554) had been delivered, Wilde B. adopts and distinctly approves of the case of *Wilson* v. *Tumman* (6 M. & G. 236), and Martin B. in his judgment does the same, and adds: 'In the note to *Armory* v. *Delamirie* in Smith's Leading Cases there occurs the following passage. "And on similar reasoning seems to rest the well-known doctrine that a subsequent ratification is tantamount to a prior command of an act done *in the name of* the party who ratifies. So that, where a person, if present at the time, could lawfully command any act to be done, any other person, though either wholly without authority, or exceeding the limits of his authority, would be justified in doing that act, provided he did it in *the name, or as one acting by* the authority, of the person entitled (whether to his advantage or not) and obtained his subsequent ratification."' In 1868 Blackburn J. in the case of *Lord* v. *Lee* ((1868) L. R.

3 Q. B. 404), when dealing with a question involving that of ratification, is in line with all those who had preceded him upon this point. That learned judge says: 'Now it is also a principle of the common law that, whenever an act is done by a person *professing to act* for another, though in reality he had no authority at the time, (subject to exceptions which do not affect the present case) the ratification of that other had the same effect as if the authority had been originally conferred, so as even to affect the vested rights of third persons. . . . It was argued for the defendant that such an enlargement of the time amounted only to the making of a fresh submission; but that is not so: the act having been done under the *professed* authority of the previous submission, the enlargement of the time is a ratification in the shape of a continuation of the original authority.'

Are all the above mere dicta? I cannot think so.

In 1877 the point now taken was expressly raised, and, as it seems to me, determined, by Lord Cairns and Brett L.J. dissentiente Cockburn C.J., in the case of *Matheson* v. *Kilburn* (1 Sm. L. C. 10th ed. p. 349). In that case a person intending to buy on behalf of another, but without authority, and without *avowing* that he was acting for another, bought goods in his own name. Lord Cairns and Brett L.J. were of opinion that a contract so made was incapable of ratification by the person for whom the buyer intended to buy, as the latter did not assume to buy on behalf of another. I know that Cockburn C.J. dissented; but can anything be clearer than what the majority, Lord Cairns and Brett L.J., held to be the law? This case is, I believe, only reported in 1 Smith's Leading Cases, 10th ed. 349. The last case which I will cite, for those which I have cited are, in my opinion, ample, is that of *Falcke* v. *Scottish Imperial Insurance Co.* (34 Ch. D. 234, at p. 249) in 1886. In that case Bowen L.J. states clearly what I believe the law to be, and what in my opinion is shewn by the cases I have had to cite at such length to be the law. That very learned Lord Justice said: 'There is nothing more vague than the way in which the word "adoption" is used in arguments at law, and sometimes ambiguous language used about adoption is imported into arguments about ratification. There is no such thing in law as adopting or ratifying anything except where there is the sanctioning of an act *professedly*

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done on your behalf in such a sense as to make you liable for it. A man can ratify that which *purports* to be done for him, but he cannot ratify a thing which purports to be done for somebody else. . . . There have been many attempts to make people liable by what is called adoption of a contract or of some other act which never purported to be made or done on their behalf, and such attempts have failed.'

It will be seen that every one of the learned judges whose judgments I have cited from, when dealing with the question of ratification, has always used the following expressions as to when a contract made by an unauthorized agent is capable of being ratified by a stranger. The contract must (*a*) have 'professed' to have been made on behalf of another; (*b*) have 'purported' to have been made on behalf of another; (*c*) have been made 'on behalf of another'; (*d*) have been made 'in the name of another'; or (*e*) the agent must have 'assumed to act on behalf of another'; every one of which expressions, in my judgment, is wholly inconsistent with an unauthorized agent keeping locked up in his own mind a mere undeclared intention that another shall afterwards participate in the contract.

It is not necessary I think to go through the text-books in which, as far as I have gone, I have found nothing inconsistent with what I believe to be the law as regards this doctrine of ratification, but I will cite two: one is Story on Agency, § 251 a, where it is laid down 'that a ratification can only be effectual between the parties where the act is done by the agent "avowedly" for or on account of the principal'; and the other is Kent's Commentaries, vol. ii. p. 616, note 1, Ratification, where the author says: 'A person cannot ratify acts done without his authority, unless they were done for him by a person assuming to act as his agent,' and for that he cites *Wilson* v. *Tumman* (6 M. & G. 236); *Watson* v. *Swann* (11 C. B. (N.S.) 756), both of which are now said to be mere dicta.

The appellants in my judgment, as I have said before, are unable to produce a single authority during the last two or three hundred years, even if they can produce one before, which I doubt, excepting the judgment of Cockburn C.J., dissented from by Lord Cairns and Brett L.J., in support of the proposition they now contend for. They do produce the case of *Soames* v. *Spencer*

(1 D. & R. 32), in which it does not appear what was the form of contract sued on, and they also seize upon an expression of Parke B. in the case of *Foster* v. *Bates* (12 M. & W. 226, at p. 287) as reported in Meeson and Welsby's Reports, which is inconsistent with what I have cited of the learned judge's expressions as Parke J. and Lord Wensleydale; but it appears from the contemporaneous reports of the case in Dowling and Lowndes' Reports and the *Jurist* and *Law Journal* (1 D. & L. 400; 13 L. J. (Ex.) 88; 7 Jur. 1093) that the expression of the learned judge is not accurately reported in Meeson and Welsby, for a material omission has therein been made, and when the accurate report of it is read, it is not in the appellants' favour.

In my judgment upon this doctrine of ratification the law has been settled for years. If I am to accede to the appellants' contention, I should have to differ from and disagree with Lord Wensleydale in the House of Lords: the Exchequer Chamber, which I could not do, even if I had desired to do so, which I do not: the Court of Appeal, consisting of Lord Cairns, Cockburn C.J., and Brett L.J., presided over by Lord Cairns, to which the same remark applies: the full Court of Common Pleas, presided over by Tindal C.J.: the full Court of Exchequer, presided over by Rolfe B.; and Parke B., before he went to the House of Lords, Holroyd J., Erle C.J., Willes J., Blackburn J., Wilde B., Martin B., and Amphlett B., and last but not least Bowen L.J.

With all submission to my learned brothers who disagree with me, I think even if I had the courage to try to differ from all these very learned judges, which I have not, it would not only be useless, but it would be most mischievous at this date to try to overturn what for years has been laid down as law by these most eminent judges without a single discordant voice, with the exception of Cockburn C.J.'s; and in my judgment, for the reasons above, this appeal should be dismissed. As my brothers, however, disagree with me, the action must go down for a new trial.

COLLINS and ROMER L.JJ. delivered judgments disagreeing with that of A. L. SMITH L.J.; but the decision of the Court was later reversed in the House of Lords sub nomine *Keighley, Maxsted & Co.* v. *Durant* [1901] A. C. 240, and the reasoning of the dissenting judgment of A. L. Smith L.J. was adopted.

HOWARD v. SHEWARD.

'If a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority.'—Per Cockburn, C.J., in *Edmunds* v. *Bushell* (1865) L. R. 1 Q. B. at p. 99.[1]

HOWARD *v.* SHEWARD (1866) L. R. 2 C. P. 148

This was an action for an alleged breach of warranty on the sale of a horse, and for money had and received. Pleas, not guilty, and never indebted.

The cause was tried before Erle, C.J., at the sittings in London after last Trinity Term, when it appeared that the defendant was a horse-dealer, and that in March, 1866, the plaintiff, being at a riding-school, asked the proprietor 'if he knew of a horse that would be likely to suit him,' and that David Sheward, the brother of the defendant, who happened to be present, and who was himself a horse-dealer, and occasionally acted in the sale of horses for the defendant, said he thought the latter had one. After some conversation, the horse in question was brought to the riding-school, and was there ridden by the plaintiff and approved of by him; and David Sheward, in answer to questions as to the character and soundness of the animal, said, 'I'll guarantee the horse is sound.' Ultimately the horse,—which had at the plaintiff's request been previously examined by a veterinary surgeon, who gave a certificate that it was sound,—was purchased by the plaintiff for 315*l.*, which sum he paid to the defendant. The horse proving to be unsound, was re-sold by the plaintiff, and this action was brought to recover the difference in price.

There was a conflict of evidence as to whether or not the horse was sound when he left the defendant's stables.

On the part of the defendant it was contended that the servant of a horse-dealer (assuming David Sheward to have been the defendant's servant for this purpose) has no implied authority to warrant on his master's behalf; and evidence was offered, and amongst other that of David Sheward himself, for the purpose

[1] It should be noted that this principle has been held to apply to a case where the *existence* of the principal is undisclosed at the time of the contract, and there has accordingly been no holding out of the agent by the principal. *Watteau* v. *Fenwick* [1893] 1 Q. B. 346; *Kinahan & Co., Ltd.* v. *Parry* [1910] 2 K. B. 389. But the point does not yet appear to have been considered by a court of appeal. [Edd.]

of shewing that the defendant had expressly desired him not to warrant the horse; but it was not suggested that this had been communicated to the plaintiff.

Evidence was also offered to shew that it was not the custom with horse-dealers to warrant, where the horse had been examined by a competent veterinary surgeon and pronounced sound.

His Lordship declined to receive the evidence, and said that he should rule that David Sheward had authority to warrant; and the jury, finding that he had done so, and that the horse was unsound, returned a verdict for the plaintiff, damages 127*l.* 10*s.*, and leave was reserved to the defendant to move to enter a nonsuit.

Hawkins, Q.C., moved, pursuant to the leave reserved, to enter a verdict for the defendant or a nonsuit, or for a new trial on the ground of misdirection and improper rejection of evidence, and that the verdict was against the weight of evidence.

WILLES, J.—I am of opinion that there ought to be no rule. As to the objection that the verdict was against the weight of evidence, I think our decision should be in accordance with the opinion of the Chief Justice. The question was one peculiarly for the consideration of the jury. There was considerable evidence on both sides: and my Lord is not dissatisfied with the conclusion the jury came to. It is not usual under such circumstances to take a case out of the hands of the tribunal to which the law has entrusted the decision of matters of fact. Then, a new trial is asked for on the grounds of misdirection and the improper rejection of evidence. The supposed misdirection consists in the Chief Justice telling the jury that there was evidence of authority in David Sheward, the defendant's brother, to warrant the horse. The character of the transaction seems to have been this:—The plaintiff was a gentleman in search of a horse; and the defendant is a large horse-dealer, having a horse to sell. Meeting David Sheward, the defendant's brother, at the place of business of another person, the plaintiff had a conversation with him, in the course of which David Sheward intimated that his brother had a horse which would be likely to suit the plaintiff, and he professed to have authority to negotiate a sale. David Sheward was himself

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carrying on the business of a horse-dealer on his own account: and it cannot be out of the scope of a horse-dealer's business to give a warranty, if a warranty may ordinarily form part of the transaction between buyer and seller. In the result, David Sheward did sell the horse to the plaintiff with a warranty of soundness: and it turned out that the horse was not sound. The defendant received the price. David Sheward did not negative the fact that this was an ordinary transaction as between his brother and himself. It must be assumed, therefore, that he negotiated the sale as his brother's agent or servant. It was not an isolated instance, though if it had been, I do not conceive that it would have made any difference: but it appeared that David Sheward had before occasionally assisted the defendant in the sale of horses. Is it, then, part of the business of a horse-dealer to warrant horses which he sells? No doubt it is where a sufficient price is given. Upon the whole I think there was clear evidence of authority to warrant. It arose out of the general character of the transaction, and any person dealing with the agent of a horse-dealer has a right to assume it. It was an ostensible authority, which could not be negatived by shewing a secret understanding between the horse-dealer and his servant that the latter was not to warrant. The case of *Brady* v. *Todd* (9 C. B. (N.S.) 592; 30 L. J. (C.P.) 223), which has been referred to, sustains that proposition. The Court there declined to extend the rule to a single transaction of sale by the servant of a private individual, because in such a case the buyer has no right to presume any authority in the servant beyond that which is apparent on the particular occasion. All the cases are collected in the excellent work of Mr. Oliphant on Horses, 3rd ed. 124, et seq., and the rule he deduces from them is, that, 'if the servant of a horse-dealer, with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed.' That introduces the second objection which has been made by the defendant, because it shews that the evidence tendered by Mr. Hawkins of the supposed usage amongst horse-dealers never to warrant where the horse has been examined by a veterinary surgeon and pronounced by him to be sound, if

not objectionable on the ground of remoteness, which I think it was, after all amounted only to a tacit direction from the principal to his agent not to warrant on this particular occasion, which, for the reasons I have already given, would not prevent that which passed between the agent and the buyer from enuring as a warranty, if that direction were disregarded. Upon neither ground, therefore, do I find any sound objection to the ruling of the Chief Justice.

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ERLE, C.J., BYLES and KEATING, JJ., concurred.

Rule refused.

'The rule which allows a person who deals with an agent not known to be such to set off against his principal any debt due from the agent to the person so dealing with him, is well settled; but it is equally well settled that this rule does not apply where the person dealing with the agent knows him to have a principal, although the name of the principal may not be disclosed.'—Per Lindley, L.J., in *Maspons y Hermano* v. *Mildred* (1882) 9 Q. B. D. at p. 544.

MONTAGU v. FORWOOD.

MONTAGU *v.* FORWOOD [1893] 2 Q. B. 350

Appeal by the plaintiffs against the judgment of Day, J., at the trial of the action without a jury, for the defendants.

The action was brought to recover a sum of 52*l.* 14*s.* 4*d.*, alleged to have been received by the defendants to the use of the plaintiffs. The money in question represented the amount of a general average loss which had been collected by the defendants from underwriters at Lloyd's. The plaintiffs were bankers in London, and they had been employed by the owners of the cargo, who were entitled to the benefit of the policies, to collect the money. They employed Messrs. Beyts & Craig, who were merchants in London, not brokers, to collect the money. Beyts & Craig, not being members of Lloyd's, employed the defendants, who were brokers at Lloyd's, to collect the money for them, This was on June 16, 1892. The defendants collected the money. and, when they had done so, they claimed to be entitled to set

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off the amount, in account with Beyts & Craig, against a larger amount which Beyts & Craig owed them. Beyts & Craig had been adjudged bankrupts on July 8 on a petition presented on July 4. The defendants, as the learned judge held on the evidence, had no notice that Beyts & Craig were acting as agents in the matter, but believed them to be principals. On July 12 the defendants sent to Beyts & Craig a credit note for the amount, which stated that it would be receivable from the underwriters on July 19. On July 18 the plaintiffs wrote letters to the trustee in the bankruptcy and to the defendants. In the letter to the trustee the plaintiffs said that, the insurance claim not having been reported to them, 'we hereby withdraw our instructions, and request you to return the documents to us.' In the letter to the defendants the plaintiffs said: 'We have reason to believe that you have become interested in the matter, and we now hereby request you neither to receive the money represented by above claim, nor to part with any amount you may hold on account of the above claim, except to us, the same being the property of our clients.' They added that they had written to the trustee of Beyts & Craig, withdrawing their instructions to collect the claim. On July 19 the defendants replied to the plaintiffs: 'We are sorry we cannot help you in this matter, as we have already credited Beyts & Craig with the amount in account current.'

This action was then brought.

The learned judge held that the action was not maintainable, because there was no privity of contract between the plaintiffs and the defendants, and that, though there was privity of property, the defendants had no notice. Judgment was accordingly entered for the defendants, with costs.

The plaintiffs appealed.

LORD ESHER, M.R.—I feel no doubt about this case. The plaintiffs were directed by a foreign bank, who were acting for the owners of the cargo, to collect a general average contribution from the underwriters in England who had insured against a general average loss. The plaintiffs employed Beyts & Craig to collect the money from the insurers. Beyts & Craig, who are not brokers, in their turn employed the defendants as their

agents to collect the money, the defendants being brokers at Lloyd's. Beyts & Craig did not tell the defendants that they were acting as agents for any one. Beyts & Craig were not brokers, nor had they in any way the character of persons whose business it was to act as agents for others. It was found by the learned judge as a fact that the defendants did not know that Beyts & Craig were acting in the matter as agents for any one. The defendants accordingly, acting as agents for Beyts & Craig, collected the money, and at the very time when they did so Beyts & Craig were indebted to them in a larger amount. At that very time the defendants had a right of set-off as against Beyts & Craig, though the right would not come into play until an action was brought. After the defendants had collected the money, and the right of set-off had accrued, the defendants, not knowing, and having no reason to suspect, and not in fact suspecting, that Beyts & Craig were acting for any principals, can the plaintiffs now intervene and say that the money belongs to them, and that the defendants were not their agents, and that the defendants cannot set off as against the plaintiffs a debt due to them from Beyts & Craig ? The law of bankruptcy has nothing to do with the case. What is the law which governs it ? I think it was settled by *Rabone* v. *Williams* (7 T. R. 360, n.), *George* v. *Clagett* (7 T. R. 359), and *Fish* v. *Kempton* (7 C. B. 687).

In *Fish* v. *Kempton* (7 C. B. at p. 691), Wilde, C.J., said : ' Where goods are placed in the hands of a factor for sale and are sold by him under circumstances that are calculated to induce, and do induce, a purchaser to believe that he is dealing with his own goods, the principal is not permitted afterwards to turn round and tell the vendee that the character he himself has allowed the factor to assume did not really belong to him. The purchaser may have bought for the express purpose of setting off the price of the goods against a debt due to him from the seller. But the case is different where the purchaser has notice at the time that the seller is acting merely as the agent of another.' And Cresswell, J., said (at p. 693) : ' This is an attempt to extend the rule laid down in *Rabone* v. *Williams* (7 T. R. 360, n.) and *George* v. *Clagett* (7 T. R. 359), which has now been uniformly acted upon for many years. If a factor sells goods as owner, and the buyer bonâ fide purchases them in the belief that he is dealing with

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the owner, he may set off a debt due to him from the factor against a demand preferred by the principal. Lord Mansfield so lays down the rule distinctly in *Rabone* v. *Williams* (7 T. R. 360, n.). 'Where,' he says, 'a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and, though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled. The distinction between a factor and a broker is noticed by Abbott, C.J., and Bayley, J., in *Baring* v. *Corrie*' (2 B. & A. 137). In *Fish* v. *Kempton* (7 C. B. 687) the plaintiff's goods had been sold to the defendant by a factor—that is, a person whose business it is to sell in his own name goods placed in his hands for that purpose by his principal; but the same principle applies to any one who is authorized to sell goods, or to receive money for his principal, when there is nothing to lead the person who deals with him to suppose, and he does not in fact know, that he is acting as an agent. When a person who sells goods is known by the purchaser to be a broker —that is, an agent—the case is entirely different: the purchaser cannot then set off a debt due to him from the broker against the demand of the principal. Beyts & Craig were not brokers, and the defendants had no reason for supposing that they were acting for a principal. They acted as if the moneys which were to be collected would, when collected, belong to themselves. It is found as a fact by the learned judge that the defendants did not know that Beyts & Craig were acting for a principal. That being so, they had a right at the moment when they received the money to set off against it a debt due to them by Beyts & Craig, and, if the plaintiffs could now intervene, they would be taking away from the defendants a valid and existing right.

BOWEN, L.J.—I am of the same opinion. The Master of the Rolls has so clearly expressed the law on the subject that I have really nothing to add, beyond saying that I concur in his view. The case is, in my judgment, governed by the principle of the decision in *George* v. *Clagett* (7 T. R. 359), by the rules of common

sense and justice, and I think also by the law of estoppel. The principle is not confined to the sale of goods. If A. employs B. as his agent to make any contract for him, or to receive money for him, and B. makes a contract with C., or employs C. as his agent, if B. is a person who would be reasonably supposed to be acting as a principal, and is not known or suspected by C. to be acting as an agent for any one, A. cannot make a demand against C. without the latter being entitled to stand in the same position as if B. had in fact been a principal. If A. has allowed his agent B. to appear in the character of a principal he must take the consequences. Here Beyts & Craig were allowed by the plaintiffs to deal with the defendants as if they had been dealing on their own account, and the defendants who dealt with Beyts & Craig are entitled to stand in the position in which they would have stood if Beyts & Craig had really been dealing as principals.

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KAY, L.J., delivered judgment to the same effect.

Appeal dismissed.

'If a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and the giving the agent money for that purpose does not amount to payment, unless the agent pays it accordingly.'—Per Parke, B., in *Heald* v. *Kenworthy* (1855) 10 Exch. at p. 745.

IRVINE & CO. v. WATSON & SONS.

IRVINE & CO. *v.* WATSON & SONS (1879) 5 Q. B. D. 102; (C. A.) 414

BOWEN, J.—The plaintiffs in this case are merchants carrying on business in Liverpool. The defendants are merchants at Leeds. The action is brought to recover from the defendants the price of eleven casks of Old Calabar palm oil. It is not denied that the defendants have had the oil, but the defendants resist the claim on the ground that the plaintiffs sold it, not to the defendants, but to Messrs. Conning & Co., from whom the defendants purchased it, and the defendants also maintain that, even supposing Conning & Co. to have been agents and brokers of the defendants and to have effected the purchase as brokers and

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agents, the plaintiffs nevertheless are precluded from suing the defendants as undisclosed principals for the price, the defendants having in the meantime, and before any claim was made, paid Conning & Co. for the goods in acceptances discounted at once by Conning & Co. The case was heard before a special jury and myself at Liverpool, when after the examination of Mr. Irvine, one of the plaintiffs' firm, the jury was by consent discharged and the case was reserved for further consideration before myself, liberty being reserved to the Court to draw reasonable inferences of fact. The material facts of the case are as follows:—On the 10th of March, 1879, the defendants gave to Conning & Co. the order for the oil in question in a letter of that date of which the following is the material extract:—'To Messrs. John Conning & Co. March 10th, 1879. We noticed last week that palm oil was very low. If you can buy Old Calabar at about 31*l.* to 31*l.* 5*s.* you may secure us about a score casks, including them in the same draft as the tallow. Yours truly, Jos. Watson & Sons.' On the 12th of March, two days after this letter, the manager of John Conning & Co. went to Mr. James Irvine, one of the plaintiff's firm and purchased eleven casks. He told Mr. Irvine that he wanted the casks for a principal in the country, but nothing further was said about such principal. A contract was thereupon made and reduced into writing as follows:—'Messrs. John Conning & Co. We have this day sold to you the following goods. [Then followed enumeration of the goods and price.] Customary allowances and public sale conditions. Payment cash (or before delivery, if required), allowing 2½ per cent. discount. pp. James Irvine & Co., W. Geikie.' The public sale conditions referred to in this document are the public sale conditions of January, 1871, of the Liverpool general brokers, the 3rd and 6th of which are as follows: '3. Brokers purchasing shall be responsible as principals unless they declare the name of the principals, such name being deemed satisfactory by the selling broker, not later than 4 o'clock on the day of the sale, or at the time of sale if after that hour. 6. Payments to be made as at present customary and, if required, upon delivery. The delivery of part shall not be considered delivery of the whole.'

Having effected the contract Messrs. Conning & Co. wrote to the defendants on the 12th of March as follows: 'We have

succeeded in getting you about ten tons fine Old Calabar oil at 31*l.* 5*s.*, and are forwarding all in accordance with your instructions.' It appears not to be infrequent in the oil trade to require payment of a portion of the price before delivery. But it is not invariable, and in the present case no such demand was made. It is also not infrequent after delivery to allow three or four days grace before insisting on payment, but this is not a matter of universal practice or of right but of courtesy, depending in each case upon the will of the parties. Delivery of eight of the casks was given by the plaintiffs to Conning & Co. on the 13th of March, and of the three remaining casks on the 15th. Exclusive of the question of the days of grace the price of the eight of the casks became payable on the 13th, and of the remainder on the 15th of March. Upon the 15th of March the defendants paid Conning & Co. for the oil by their acceptances which were received on the 17th and discounted on the same day. On or about the same day an invoice, misheaded the 12th of March, was forwarded by Conning & Co. to the defendants, a copy of which is as follows:— 'Liverpool, 12th March, 1879. Contract. Messrs. Josh. Watson & Sons, bought per John Conning & Co. Payment cash, less 2½ per cent. Eleven casks of palm oil.' [Then followed particulars of the casks and price.] No application was made by the plaintiffs to any one for payment until about the 17th or 18th of March. On or about the 17th or 18th of March the plaintiffs applied personally to Conning & Co. for payment. Written applications for payment not unaccompanied in the end with threats were subsequently made by the plaintiffs to Conning & Co. on the 21st March, and between that date and the 25th. On the 27th of March, Conning & Co. stopped payment, and on the 28th of March, 1879, application was for the first time made by the plaintiffs to the defendants in a letter of that date. The defendants replied that they had paid Conning & Co. for the oil, and repudiated all liability to the plaintiffs, whereupon this action was brought. Whether Messrs. Conning & Co. were the agents of the defendants to make the contract which they made, or to bind the defendants thereby is a question of fact. I think they had the defendants' authority to do so. The letter of the 10th of March appears to me to be an order to buy for and on behalf of the defendants in the way in which a broker may properly be requested to buy,

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viz., in his own name, but still as a broker and for a principal behind. This is exactly what Conning & Co. did, and I think that they had authority to and did bind the defendants by that contract, the terms of which were cash, less 2½ per cent. discount, or before delivery, if required. The next question is whether anything has happened to exonerate the defendants from liability under this contract.

There are two classes of sales through an agent to an undisclosed principal which it is necessary to distinguish. 1. Where the seller supposes himself to be dealing with a principal, but discovers afterwards that he has been selling to an agent, and that there is an undisclosed principal behind, the law allows the seller to have recourse on such discovery to the undisclosed principal, provided always (see per Lord Tenterden, C.J., and Bayley, J., in *Thomson* v. *Davenport* (9 B. & C. 78)), that the principal has not meanwhile paid the agent, or that the state of accounts between the principal and agent does not render it unjust, i. e., inequitable that the seller should any longer look to the principal for payment. This statement of the proviso which relieves the undisclosed principal in certain cases from all necessity to pay the seller, was thought by Parke, B., and the other judges in *Heald* v. *Kenworthy* (10 Exch. 745 ; 24 L. J. (Ex.)), to be too large without further explanation, and they expressed the view that the only case, in which the seller under such circumstances was precluded from having recourse to the undisclosed principal when discovered, was when the seller by some conduct of his own had misled the principal into paying or settling with his agent in the interim. The principal, such is the reasoning of the Court of Exchequer, has originally authorized his agent to create a debt, and the principal cannot be discharged from the debt unless the seller has estopped himself by his conduct from enforcing it against him. The Court of Queen's Bench in *Armstrong* v. *Stokes* (Law Rep. 7 Q. B. 599), do not adopt this narrower version of Lord Tenterden's, and Mr. Justice Bayley's proviso. They revert to the wider language used by Lord Tenterden, C.J., and Bayley, J., in *Thomson* v. *Davenport* (9 B. & C. 78), and it must now be taken to be the law that a seller who has given credit to an agent believing him to be a principal cannot have recourse against the undisclosed principal, if the principal has bona fide paid the agent at a time

when the seller still gave credit to the agent, and knew of no one else except him as principal. 2. The present case is one that belongs to a distinct but analogous class. At the time of the dealing in the goods the seller was informed that the person who came to buy was buying for a principal, but was not told and did not ask who that principal was, nor anything further about him. *Thomson* v. *Davenport* (9 B. & C. 78) is the leading authority to shew that, in such a case where no payment or settlement in account between the undisclosed principal and his agent has intervened, the seller may afterwards have recourse to the undisclosed principal. But what if the undisclosed principal has meanwhile innocently paid or settled with his agent? If indeed such payment or settlement is the result of any misleading conduct on the part of the seller, then no doubt the general principles alluded to in *Heald* v. *Kenworthy* (10 Ex. 739; 24 L. J. (Ex.) 76) would equally apply, and the seller could no longer pursue his remedy against the man whom he had misled. But is this the only proviso, or must a wider proviso still in the present class of cases be engrafted on the statement of the rule similar to the proviso as finally sanctioned in *Armstrong* v. *Stokes* (Law Rep. 7 Q. B. 599)? The case of *Armstrong* v. *Stokes* (Law Rep. 7 Q. B. 599) was a case in which at the time of the sale exclusive credit had been given by the seller to the agent who bought in his own name as principal. In the present instance the agent bought, it is true, in his own name, but held out to the seller the additional advantage of the credit of an unnamed principal behind. What difference to the liability of the principal does this make? It is obvious that when, as in *Armstrong* v. *Stokes* (Law Rep. 7 Q. B. 599), the seller deals exclusively with the agent as principal, the seller sells knowing, if his buyer turns out to have a principal behind him, the principal will have, at all events, been justified in assuming as the fact is that the seller deals simply with the agent. The principal may be expected to arrange with his agent on this basis. If before recourse is had to him the undisclosed principal has put his agent in funds to pay, the seller cannot afterwards object that the undisclosed principal who had a right to suppose his credit was not looked to in the matter should have held his hand. The case is altered where the agent when buying states that he has a principal whose existence,

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though he does not name him, he is authorized in mentioning. I think that the liability of the principal, who under such circumstances pays his agent, to pay over again to the seller must depend in each case on what passes between the seller and the agent acting within the scope of his authority, and on the precise nature of the contract which the agent has lawfully made. In the present instance the plaintiffs were informed that Conning & Co. bought as agents, and that they had an undisclosed principal in the transaction. The plaintiffs sold, trusting partly, but not wholly to the credit of the agent, for in fact they relied on the credit of an unknown and unnamed principal to the disclosure of whose name they were entitled on demand. The contract was for cash; the price was if not received before delivery to be payable forthwith upon delivery. The essence of such a transaction is that the seller as an ultimate resource looks to the credit of some one to pay him if the agent does not. Till the agent fails in payment the seller does not want to have recourse to this additional credit. It remains in the background: but if, before the time comes for payment or before, on non-payment by the agent, recourse can be fairly had to the principal whose credit still remains pledged, the principal can pay or settle his account with his own agent, he will be depriving the seller behind the seller's back of his credit. It surely must, at all events, be the law that in the case of sale of goods to a broker the principal known or unknown cannot, by paying or settling before the time of payment comes with his own agent, relieve himself from responsibility to the seller, except in the one case where exclusive credit was given by the seller to the agent. But may the payment or settlement to or with the agent be safely made in such a case after the day of payment has arrived, and if so within what time? It seems to me that it can only safely be made if a delay has intervened which may reasonably lead the principal to infer that the seller no longer requires to look to the principal's credit, such a delay for example as leads to the inference that the debt is paid by the agent, or to the inference that though the debt is not paid the seller elects to abandon his recourse to the principal and to look to the agent alone. Here the defendants parted with the acceptance on the 15th, it was discounted on the 17th. The plaintiffs had only given delivery on the 13th of eight of the

casks, and of three upon the 15th. It does not appear to me, without laying any stress on the question of the days of grace, that the defendants on the 17th of March had any reason at all to believe that the sellers of the goods, whoever they might be, had no longer any claim upon any one except the broker. The fact is the defendants trusted their own broker. They made a mistake and must pay for it. The language of Lord Ellenborough in *Kymer* v. *Suwercropp* (1 Camp. 109) is consistent with this view of the law, and it is one which has since been adopted in *Heald* v. *Kenworthy* (10 Exch. 739 ; 24 L. J. (Ex.) 76). Up to the 17th of March I see nothing accordingly which relieves the defendants from responsibility. Did the delay beyond that date and the failure of the brokers do so ? If there was any reason to believe that in consequence of the delay the defendants' position towards their agents had been injuriously affected, then the defendants would to that extent be discharged. But I see no evidence that it was so. The defendants accordingly in my judgment remain liable for the price of the goods, and judgment must be given for the plaintiffs with costs.

The defendants appealed.

Bramwell, L.J.—I am of opinion that the judgment must be affirmed. The facts of the case are shortly these :—The plaintiffs sold certain casks of oil, and on the face of the contract of sale Conning appeared as the purchaser. But the plaintiffs knew that he was only an agent buying for principals, for he told them so at the time of the sale, therefore they knew that they had a right against somebody besides Conning. On the other hand, the defendants knew that somebody or other had a remedy against them, for they had authorized Conning, who was an ordinary broker, to pledge their credit, and the invoice specified the goods to have been bought ' per John Conning.' Then, that being so, the defendants paid the broker ; and the question is whether such payment discharged them from their liability to the plaintiffs. I think it is impossible to say that it discharged them, unless they were misled by some conduct of the plaintiffs into the belief that the broker had already settled with the plaintiffs, and made such payment in consequence of such belief. But it is contended that the plaintiffs here did mislead the defendants into such belief,

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by parting with the possession of the oil to Conning without getting the money. The terms of the contract were 'cash on or before delivery,' and it is said that the defendants had a right to suppose that the sellers would not deliver unless they received payment of the price at the time of delivery. I do not think, however, that that is a correct view of the case. The plaintiffs had a perfect right to part with the oil to the broker without insisting strictly upon their right to prepayment, and there is, in my opinion, nothing in the facts of the case to justify the defendants in believing that they would so insist. No doubt if there was an invariable custom in the trade to insist on prepayment where the terms of the contract entitled the seller to it, that might alter the matter; and in such case non-insistance on prepayment might discharge the buyer if he paid the broker on the faith of the seller already having been paid. But that is not the case here; the evidence before Bowen, J., shews that there is no invariable custom to that effect.

Apart from all authorities, then, I am of opinion that the defendants' contention is wrong, and upon looking at the authorities, I do not think that any of them are in direct conflict with that opinion. It is true that in *Thomson* v. *Davenport* (9 B. & C. 78) both Lord Tenterden and Bayley, J., suggest in the widest terms that a seller is not entitled to sue the undisclosed principal on discovering him, if in the meantime the state of account between the principal and the agent has been altered to the prejudice of the principal. But it is impossible to construe the dicta of those learned judges in that case literally; it would operate most unjustly to the vendor if we did. I think the judges who uttered them did not intend a strictly literal interpretation to be put on their words. But whether they did or no, the opinion of Parke, B., in *Heald* v. *Kenworthy* (10 Ex. 739; 24 L. J. (Ex.) 76) seems to me preferable; it is this, that 'If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller, either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal.' That is in my judgment

a much more accurate statement of the law. But then the defendants rely on the case of *Armstrong* v. *Stokes* (Law Rep. 7 Q. B. 598). Now that is a very remarkable case; it seems to have turned in some measure upon the peculiar character filled by Messrs. Ryder as commission merchants. The Court seemed to have thought it would be unreasonable to hold that Messrs. Ryder had not authority to receive the money. I think upon the facts of that case that the agents would have been entitled to maintain an action for the money against the defendant, for as commission merchants they were not mere agents of the buyer. Moreover the present is a case, which Blackburn, J., there expressly declines to decide. He expressly draws a distinction between a case in which, as in *Armstrong* v. *Stokes* (Law Rep. 7 Q. B. 598), the seller at the time of the sale supposes the agent to be himself a principal, and gives credit to him alone, and one in which, as here, he knows that the person with whom he is dealing has a principal behind, though he does not know who that principal is.

It is to my mind certainly difficult to understand that distinction, or to see how the mere fact of the vendor knowing or not knowing that the agent has a principal behind can affect the liability of that principal. I should certainly have thought that his liability would depend upon what he himself knew, that is to say whether he knew that the vendor had a claim against him and would look to him for payment in the agent's default. But it is sufficient here that the defendants did know that the sellers had a claim against them, unless the broker had already paid for the goods.

In this view of the case it is unnecessary to consider the further question raised by Mr. Kennedy, as to whether a payment on a general running account, as distinguished from a payment specifically appropriated to the particular purchase, would be sufficient to bring the case within Lord Tenterden's qualification of the general rule.

BAGGALLAY and BRETT, L.JJ., delivered judgments to the same effect.

Appeal dismissed.

COLLEN v. WRIGHT.

'The general rule of law is clear that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it. This general rule is admitted by the plaintiff's counsel, and prima facie includes the present case. But then it is urged that the decision in *Collen* v. *Wright* has shown that there is an exception to that general rule, and it is contended that this case comes within the principle of that exception. I do not think that *Collen* v. *Wright*, properly understood, shows that there is an exception to that general rule. *Collen* v. *Wright* established a separate and independent rule, which, without using language rigorously accurate, may be thus stated: if a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction.'—Per Bramwell, L.J., in *Dickson* v. *Reuter's Telegram Company* (1877) 3 C. P. D. at p. 5.

'The rule is not confined to the bare case where the transaction is simply one of contract, but it extends to every transaction of business into which a third party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person.'—Per Lord Davey in *Starkey* v. *Bank of England* [1903] A. C. at p. 119.

COLLEN *v.* WRIGHT (1857) 8 E. & B. 647

Appeal from the decision of the Court of Queen's Bench on a case stated without pleadings (7 E. & B. 301).

In substance, it stated that the testator Wright was land agent for a gentleman named Gardner, and, as such, made an agreement with the plaintiff for the lease to him for 12½ years of a farm of Gardner's. A formal agreement between landlord and lessee was drawn up and signed by the testator in the following form: 'Robert Wright, agent to William Dunn Gardner Esquire, lessor.' It was also signed by plaintiff. The plaintiff entered on the farm on the strength of this agreement. Mr. Gardner refused to execute any such lease, alleging, accurately as it proved, that he had conferred on the testator no authority to agree for a lease for so long a term. The plaintiff had commenced a suit in Chancery against Gardner for a specific performance. On discovering the ground of defence, his solicitors sent to Wright a formal notice that, unless they received from Wright notice to the contrary, the plaintiff would proceed with the suit at Wright's

expense ; and, in the event of his bill being dismissed on the ground of the absence of authority, would commence an action to recover the costs and other damages by reason of Wright's want of authority. Wright's solicitor sent an answer, dated 11th April 1855, denying Wright's liability to any action, but not containing any admission that Wright had not had full authority. The suit was proceeded with, and the bill dismissed with costs, on the ground that Wright had no authority from Gardner to sign the agreement. The case in the Queen's Bench was stated after Wright's death, and submitted two questions to the Court : 1. Whether the plaintiff is entitled to maintain an action against the defendants, as executrix and executors of the said Robert Wright, to recover damages ; 2. Whether, if so, the whole of the damages sustained by the plaintiff, including his costs of the said suit in Chancery can be recovered ; or, if some of such damages and costs only can be recovered, which of them, and to what extent, without regard, however, to the exact amount. The case contained provisions for a judgment, subject to an arbitration to ascertain the amount of damages according to the principles laid down by the Court. The Court of Queen's Bench ordered that judgment should be ' entered for the plaintiff for such amount of damages as shall include money laid out and costs of Chancery suit.' The defendants appealed.

WILLES, J. delivered the following judgment, in which POLLOCK, C.B., WILLIAMS, J., and BRAMWELL, WATSON and CHANNELL, Bs., concurred.

It appears to me that the judgment of the Court of Queen's Bench ought in all respects to be affirmed. I am of opinion that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. This is not the case of a bare misstatement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act ; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the

COLLEN v. WRIGHT. — Willes, J.

inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise. Indeed the contract would be binding upon the person dealing with the professed agent if the alleged principal were to ratify the act of the latter. This was, in effect, the view taken by the Court of Queen's Bench, and to which I adhere. With respect to the amount of damages, I retain the opinion thrown out in the course of the argument, that all the expenses sought to be recovered were occasioned by the assertion of authority made at the time of the contract being continued and persisted in by the defendant's testator and bona fide acted upon by the plaintiff. That assertion was never withdrawn, not even in the letter of 11th April, 1855, in answer to the plaintiff's notice to the defendant's testator, long after the proceedings in Chancery had commenced and whilst they were in full progress. I am therefore of opinion that the judgment of the Queen's Bench was right, and that it ought to be affirmed.

COCKBURN, C.J. dissented.

Judgment affirmed.

FLEMYNG v. HECTOR; ADAMS v. O'BRIEN; ADAMS v. RIPPON.

'Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by every one, that clubs are formed; and this distinguishing feature has been

often judicially recognized.'—Per Lord Lindley in *Wise* v. *Perpetual Trustee Company* [1903] A. C. at p. 149.

FLEMYNG *v.* HECTOR, ADAMS *v.* O'BRIEN, ADAMS *v.* RIPPON (1836) 2 M. & W. 172

These were actions brought against the several defendants for work done, and goods supplied for the use of the late 'Westminster Reform Club,' of which the defendants were members, under the following circumstances :—

The Westminster Reform Club was established in London in the year 1834, for the ordinary purposes of the clubs existing at the west end of the town, and on a similar footing, except that the members were to be chosen from among those professing political opinions in accordance with the principles of the Reform Act.

At a general meeting, held on the 23rd of May, 1835, certain rules were agreed upon for the regulation of the Club, which were printed, and of which the following only are material to be noticed :

'6. That the entrance fee on admission to the club shall be ten guineas, and the annual subscription five guineas.

'8. That if the annual subscription be not paid within two months from the 14th of April, the defaulter shall cease to be a member of the club.

'10. That [certain persons therein mentioned] should be trustees for the club.

'19. That there should be a committee to manage the affairs of the club, consisting of thirty members, to be chosen by vote at a general meeting of the club.

'22. That there should be two general meetings of the club in each year.

'23. That at such meetings an ample statement of the affairs of the club should be presented, signed by the chairman of the committee and the secretary, and such statement should be exhibited in the coffee-room for examination, seven days previous to the meeting.

'28. That all members be expected to discharge their club bills day by day, the steward having positive orders not to open accounts with any individual, and being authorized to refuse to

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continue to supply parties neglecting to pay what they may owe, after payment is requested.'

A committee had been chosen on the first formation of the club, who took a furnished house in Great George-street for its use, at a rent of 1000 guineas per annum. Until the above rules were promulgated there were no written or printed rules; but resolutions were passed from time to time by the committee for the regulation of the society. The club was dissolved in February, 1836, and the members were called upon to pay a sum of eleven guineas each, in discharge of its liabilities. The defendant, among other members, refused to pay this sum, and these actions were in consequence brought against them.

Flemyng v. *Hector*, which was tried at the last Surrey assizes, before Lord Abinger, C.B., was an action by the plaintiff, a wine-merchant, for wines supplied to the club during the whole period of its existence. It appeared that the defendant was elected a member in April 1835, and paid his entrance-money and subscription, and continued to frequent and dine at the club until its dissolution; it was proved also that he was in the habit of asking for 'Flemyng's wine.' Two sums had been paid by order of the committee to the plaintiff on account of his bill, after the defendant was admitted a member, which were more than sufficient to satisfy the amount of the wine supplied while the defendant was a member; but they were not specifically appropriated, and the plaintiff applied them in satisfaction of the earlier items of his account. It was contended for the defendant, first, that he was not liable at all merely as a member of the club; secondly, that at all events the damages ought to be nominal, the payments being a satisfaction of the plaintiff's demand as against the defendant. The Lord Chief Baron expressed an opinion against the defendant on both points, and under his direction a verdict was found for the plaintiff for the full amount claimed, leave being reserved to the defendant to move to enter a nonsuit: and on a former day of this term, Thesiger obtained a rule nisi accordingly, against which cause was shewn by Andrews, Serjt., Sir W. Follett, and Montague Chambers; and Thesiger and Platt were heard in support of the rule.

Adams v. *O'Brien*, which was also tried before the Lord Chief Baron, at the same assizes, was an action by ironmongers, who

had supplied stoves and other ironwork, and let knives and forks, &c., to hire for the use of the club. The defendant was proved to have attended very frequently; and it was shewn that the committee made out a statement of the affairs and liabilities of the club, in which the plaintiff's claim was inserted, and that it was hung up in the coffee-room. In this case also a verdict was directed for the plaintiff, the same leave being reserved as in the former case. Platt obtained a rule for a nonsuit accordingly; Andrews, Serjt. and Chambers, shewed cause, and Platt supported the rule.

While these rules were pending, the case of *Adams* v. *Rippon*, which was an action by the same plaintiffs, and of the same nature, as that of *Adams* v. *O'Brien*, was tried before Bolland, B., at the sittings in Middlesex. It appeared that Mr. Rippon, besides being a member of the club, had been named and chosen one of the committee; but he was not proved to have acted in that character, or to have taken any part in the proceedings of the club. Application had also been made to him to become one of the trustees, to which he consented; but he was not appointed. Evidence was given of a conversation between the defendant and the plaintiff's attorney, in which the former stated that he knew he was liable, but he had paid a sum of money already, and would pay no more, but would defend any action that might be brought against him. It appeared that he did not pay his subscription for the year 1835–6, until after the expiration of two months from the 14th April, 1835; and it was contended that he thereby ceased to be a member of the club from that day, and was therefore, at all events, not liable in respect of any goods subsequently supplied. The learned Judge considered himself bound by the rulings in the previous cases to direct the jury that the defendant was liable as a member of the club; and he left the question to them whether he continued a member for more than the first year. The jury found that he was a member for one year only, and gave a verdict accordingly for 7*l.* 10*s.*, the amount of goods furnished within that period. His lordship gave leave to move to enter a nonsuit, and such rule having been obtained, Erle and Chambers shewed cause, and Platt was heard in support of it.

PARKE, B.—This is an action brought against the defendant on

FLEMYNG v. HECTOR; ADAMS v. O'BRIEN; ADAMS v. RIPPON. — Parke, B.

a contract, and the plaintiff must prove that the defendant, either himself or by his agent, has entered into that contract. That should always be borne in mind in cases of this class; for on most questions of this kind the real ground of liability is very apt to be lost sight of. As the defendant did not enter into the contract personally, it is quite clear that the plaintiff cannot recover against the defendant, unless he shews that the person making the contract was the agent of the defendant, and by him authorized to enter into the contract on his behalf; and the question is in this case, whether there was sufficient evidence to go to the jury to satisfy them that the person who actually ordered these goods, was the authorized agent of the defendant in making the contract; and that really is the question in all cases of this kind—in all cases of principal and agent, master and servant—wherever the contract is not made personally by the defendant. It is said in this case that the order was given by the committee, and that they were the agents of the members generally; but the question is, whether there was any sufficient evidence to go to the jury that they were authorized by the defendants to enter into and make these particular contracts on their behalf. In the case of *Flemyng* v. *Hector*, it is said there was sufficient evidence of one fact, namely, that he was a member of the club, and next, that the whole of the debts were debts contracted on account of the club; and that this is evidenced by the written rules. That is a question of construction, and therefore a question of law; and it is upon the construction of these rules that the liability of the defendant depends, so far as the case depends upon his being a member of the club; and both these cases, of *Flemyng* v. *Hector*, and *Adams* v. *O'Brien*, resolve themselves into questions of construction as to the meaning of the original rules of the club. It appears to be quite clear that the club was formed upon ready-money principles: the committee did however enter into some contracts upon credit, and it is said the defendant has sanctioned this,—of which there is no evidence at all; and the case could go to the jury only on the ground of there having been such sanction on the part of the defendant. First, as to the construction of the rules of this club. On referring to these rules, it appears to be clear, that the intention of the club was to provide a fund, to be administered by the committee, and to provide the

means of the society's carrying on their concerns, without the necessity of dealing on credit. [His lordship read the 5th, 6th, 7th, and 28th rules.] It is quite clear, from the provisions of these rules, that the society contemplated that there should be a fund in hand to meet the expenses. The 19th rule, which is relied upon as giving the committee authority to bind the defendants, only provides that they shall manage the affairs of the club. Now I think it is impossible to come to any other conclusion on the true construction of these rules, than that all the committee was to do, was to manage the fund thus supplied; and if they chose to enter into contracts upon credit when they had not sufficient funds, that is their own affair. There is no evidence in the case to warrant any conclusion that a society of this nature should have gone on dealing upon credit: all the committee had to do was, either to pay ready money, or not to enter into any contract until they had money in hand; or if they chose to do so, it was mere matter of convenience, and they were not to suppose they were binding the members individually to pay, for they had the means of payment in their hands. I have no doubt that is the true construction to be put upon the written documents. There is no evidence to shew that the defendant had given authority to the committee to act as his agents, so as to render him liable on a contract of this kind; and it should be shewn affirmatively by the plaintiff, that he had assented to their trading in a different manner from that which is contemplated by the rules. The only thing given in evidence was an order to pay a sum of money on account, on behalf of the members of the club, to Mr. Flemyng, but the defendant is not proved to have sanctioned this; and even if he had, there is no proof that he knew at the time that the committee were not in funds when they entered into the contract. The committee might at any time, pursuant to their original authority, have entered into a contract for the purchase of wine, when they had money in the bankers' hands, and there is no proof they had not, at the time of the alleged contract, money in hand, or if they had not, that the defendant knew anything of it. The inference sought to be drawn rests altogether on the ground of the committee's not dealing in the way they ought to deal; but if that is to vary the authority given by the original rules, it ought to be shewn

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affirmatively that the defendant did know and sanction it. It seems to me, therefore, that the two cases of *Flemyng* v. *Hector*, and *Adams* v. *O'Brien*, stand on the same footing, and that a non-suit ought to be entered in both. With regard to the other case, the question in fact comes to the same point. It appears that Mr. Rippon was named on the committee, but it is not shewn that he ever acted as a committee-man, or sanctioned his being so named, and that ground of liability therefore falls to the ground. It appears also that he was a member before these regulations were published:—but the only piece of evidence in the case that seemed at all to affect him, was that on which the Chief Baron has observed, viz., that when applied to by the clerk of the plaintiff's attorney, Mr. Rippon said he knew he was a member of the club, and as such liable; but I think that imports nothing more than that he knew he was a member of the club, as he had paid his subscription for the second year as well as the first: and then as to his liability, it is nothing more than the expression of his opinion, first, of his being a member of the club, and secondly of his liability, in which he is wrong. Indeed, in the very same breath, he says he will defend any action that may be brought against him, and have the question settled. It seems to me, therefore, that the case of *Adams* v. *Rippon* differs in no respect from the others, and all the cases resolve themselves into questions of law as to the construction of these rules and regulations. I am of opinion, for the reasons I have given, that the defendants are not liable.

ALDERSON, B.—I am of the same opinion. This question turns simply on the authority which the parties who made the contracts had to pledge the credit of the defendants to the plaintiffs. Taking it that the committee have made the contract, and that they are by the rules of the society authorized to manage the affairs of the club, it may follow from that that the defendants have given authority to the committee to discharge the contract out of the funds in their hands: but it is contended on the part of the committee that they had a right to pledge the personal credit of the members, and therefore to make these defendants liable. I think they have not. When I come to look at the rules of the club, which are to be the guide by which we are to act,

and which constitute the only authority the committee had, I do not find anything to lead me to the conclusion that the authority of the committee extended to the right of pledging the personal liability of any of the members of it ; on the contrary, I find the members of the club carefully provided a fund, which was to be collected before they became members of the club, and having collected that fund and provided it, the committee are to manage it. Then what is it the committee are to manage ? Why, the fund so provided, and to manage the club upon those terms. If that be so, the committee are not authorized to pledge the credit of individual members ; and if they do deal on credit, it is their own affair, done on the faith of the money in their hands, which would enable them to pay their accounts. It seems to me there is no pretence for saying, in this case of *Adams* v. *Rippon*, (which is the only one I have heard, and the only one I shall enter into on the present occasion), that the defendant is liable. With respect to the others, I agree in the general principles laid down by the rest of the Court, and I have no doubt the application of those principles is correct.

LORD ABINGER, C.B. and GURNEY, B. delivered judgments to the same effect.

Rules absolute.

KELLY v. SOLARI.

'Is quoque qui non debitum accepit ab eo qui per errorem solvit re obligatur . . . sed haec species obligationis non videtur ex contractu consistere, quia is qui solvendi animo dat magis distrahere vult negotium quam contrahere.'—Institutes of Gaius, iii, § 91.

KELLY *v.* SOLARI (1841) 9 M. & W. 54

ASSUMPSIT for money paid, money had and received, and on an account stated. Plea, non assumpsit. At the trial before Lord Abinger, C.B., at the London sittings after Trinity Term, it appeared that this was an action brought by the plaintiff, as one of the directors of the Argus Life Assurance Company, to recover from the defendant, Madame Solari, the sum of 197*l.* 10*s.* alleged to have been paid to her by the company under a mistake of fact, under the following circumstances.

Mr. Angelo Solari the late husband of the defendant, in the year 1836, effected a policy on his life with the Argus Assurance Company for £200. He died on the 18th of October, 1840, leaving the defendant his executrix, not having (by mistake) paid the quarterly premium on the policy, which became due on the 3rd of September preceding. In November, the actuary of the office informed two of the directors, Mr. Bates and Mr. Clift, that the policy had lapsed by reason of the non-payment of the premium, and Mr. Clift thereupon wrote on the policy, in pencil, the word 'lapsed.' On the 6th of February, 1841, the defendant proved her husband's will; and on the 13th, applied at the Argus office for the payment of the sum of £1000, secured upon the policy in question and two others. Messrs. Bates and Clift, and a third director, accordingly drew a cheque for 987*l.* 10*s.*, which they handed to the defendant's agent, the discount being deducted in consideration of the payment being made three months earlier than by the rules of the office it was payable. Messrs. Bates and Clift stated in evidence, that they had, at the time of so paying the money, entirely forgotten that the policy in question had lapsed. Under these circumstances, the Lord Chief Baron ex-

pressed his opinion, that if the directors had had knowledge, or the means of knowledge, of the policy having lapsed, the plaintiff could not recover, and that their afterwards forgetting it would make no difference; and he accordingly directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for him for the amount claimed.

A rule nisi was obtained accordingly, or for a new trial.

LORD ABINGER, C.B.—I think the defendant ought to have had the opportunity of taking the opinion of the jury on the question whether in reality the directors had a knowledge of the facts, and therefore that there should be a new trial, and not a verdict for the plaintiff; although I am now prepared to say that I laid down the rule too broadly at the trial, as to the effect of their having had means of knowledge. That is a very vague expression, and it is difficult to say with precision what it amounts to; for example, it may be that the party may have the means of knowledge on a particular subject, only by sending to and obtaining information from a correspondent abroad. In the case of *Bilbie* v. *Lumley* (2 East 469), the argument as to the party having means of knowledge was used by counsel, and adopted by some of the judges; but that was a peculiar case, and there can be no question that if the point had been left to the jury, they would have found that the plaintiff had actual knowledge. The safest rule however is, that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again. There may also be cases in which, although he might by investigation learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding; in that case there can be no doubt that he is equally bound. Then there is a third case, and the most difficult one,—where the party had once a full knowledge of the facts, but has since forgotten them. I certainly laid down the rule too widely to the jury, when I told them that if the directors once knew the facts they must be taken still to know them, and could not recover by saying that they had since forgotten them. I think the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment. I have little doubt in this case

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that the directors had forgotten the fact, otherwise I do not believe they would have brought the action; but as Mr. Platt certainly has a right to have that question submitted to the jury, there must be a new trial.

PARKE, B.—I entirely agree in the opinion just pronounced by my Lord Chief Baron, that there ought to be a new trial. I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the dictum [1] of Mr. Justice Bayley, in the case of *Milnes* v. *Duncan*; and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it.

GURNEY and ROLFE, BB., concurred.

Rule absolute for a new trial.

[1] 'If a party pay money under a mistake of the law he cannot recover it back. But if he pay money under a mistake of the real facts, and no laches are imputable to him (in respect of his omitting to avail himself of the means of knowledge within his power) he may recover back such money.' 6 B and C. at p. 677. [Edd.]

'The principle of law is not that money paid under a judgment, but that money paid under the pressure of legal process cannot be recovered. The principle is based upon this, that when a person has had an opportunity of defending an action if he chose, but has thought proper to pay the money claimed by the action, the law will not allow him to try in a second action what he might have set up in the defence to the original action.'—Per Lord Halsbury in *Moore* v. *Vestry of Fulham* [1895] 1 Q. B. at p. 401.

MARRIOT *v.* HAMPTON (1797) 7 T. R. 269

The defendant formerly brought an action against the present plaintiff for goods sold, for which the plaintiff had before paid and obtained the defendant's receipt; but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to submit and pay the money again, and he gave a cognovit for the costs. The plaintiff afterwards found the receipt, and brought this action for money had and received in order to recover back the amount of the sum so wrongfully enforced in payment. But Lord Kenyon was of opinion at the trial that after the money had been paid under legal process, it could not be recovered back again, however unconscientiously retained by the defendant, though the case of *Moses* v. *Macferlan*, 2 Burr. 1009, was referred to; and thereupon the plaintiff was nonsuited.

Gibbs now moved to set aside the nonsuit and to grant a new trial; relying on a subsequent case of *Livesay* v. *Rider*, E. 22 Geo. 3, B. R. where on a similar motion the Court held such an action maintainable. And he pressed for the opinion of the Court in order that the question might be settled.

LORD KENYON, C.J.—I am afraid of such a precedent. If this action could be maintained I know not what cause of action could ever be at rest. After a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person. I cannot therefore consent even to grant a rule to shew cause, lest it should seem to imply a doubt. It often happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial; and they are as often refused; but this goes much further.

ASHHURST, J. of the same opinion.

MARRIOT v. HAMPTON. — GROSE, J. GROSE, J.—It would tend to encourage the greatest negligence if we were to open a door to parties to try their causes again because they were not properly prepared the first time with their evidence. Of the general principle there can be no doubt; and though the last case cited seems to throw some ambiguity upon it, yet some of the positions there stated [1] are so entirely repugnant to every principle of law, that I have less difficulty in disregarding the whole authority of it.

LAWRENCE, J.—If the case alluded to be law, it goes the length of establishing this, that every species of evidence, which was omitted by accident to be brought forward at the trial, may still be of avail in a new action to overrule the former judgment; which is too preposterous to be stated.

Rule refused.

SLADE'S CASE. ' The claim in *Moses* v. *Macferlan* ((1760) 2 Burr. 1005) was one of assumpsit in the form of the common indebitatus assumpsit count. This was a form of claim which had been very gradually evolved. The researches of recent writers appear to me to have placed its origin in its true light. The basis of actions of this kind was originally tort, a writ having been framed in consimili casu under the provisions of c. 24 of the Statute of Westminster (13 Edw. I). By degrees, out of this action on the case and as one of its forms, a new form which was soon to diverge wholly from tort, the action of assumpsit, arose. In *Slade's Case* the judges resolved that "every contract executory imports in itself an assumpsit", with the result that it became no longer necessary or desirable to use as the remedy where money was due the action of debt, which was embarrassing because it let in the right to a "wager of law". Then came the extension of indebitatus assumpsit to cases in which it was clear that no express promise could be proved. For, as Lord Mansfield points out, the law is ready to imply a debt in such cases arising quasi ex contractu. The promise to pay which created the right of action might have been a pure fiction of law. In many cases no such promise could possibly have been established. Yet it took some time before the judges brought themselves to go so far. *Starke* v. *Cheesman* ((1699) 1 Ld. Raym. 538) was a claim on a bill of exchange by the holder against the drawer on the allegation that the drawee had refused to accept. It was held that an

[1] Which his Lordship read from the note of it.

actual promise must be implied. But what is remarkable is the language of the judgment in which the declaration, which contained an indebitatus assumpsit count, was held good. Holt, C.J., is reported to have said "that the notion of promises in law was a metaphysical notion, for the law makes no promise, but where there is a promise of the party". Yet, the observation of Holt, C.J., notwithstanding, a little later on this "metaphysical notion" became firmly established. For it was just the fiction of attributing a promise in a multitude of cases where in reality there was none which finally gave the action its comprehensive range, and made it available even where no fact importing or implying privity of contract could be proved. The history of the action of assumpsit has been described by a writer to whom lawyers and historians alike owe much, the late Professor Ames of Harvard University, in language which shows how easily the fiction of a promise grew into part of the law. Speaking of the action of assumpsit generally he says: "In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded debt, became concurrent with account, with case upon a bailment, a warranty, and bills of exchange, and competed with equity in the case of the essentially equitable quasi-contracts growing out of the principle of unjust enrichment." '—Per Viscount Haldane, L.C., in *Sinclair* v. *Brougham* [1914] A. C. at pp. 416–17.

Slade's Case (1603) 4 Co. Rep. 92 b

John Slade brought an action on the case in the King's Bench against Humphrey Morley, (which plea began Hil. 38 Eliz. Rot. 305.) and declared, that whereas the plaintiff, 10th of November, 36 Eliz. was possessed of a close of land in Halberton, in the county of Devon, called Rack Park, containing by estimation eight acres for the term of divers years then and yet to come, and being so possessed, the plaintiff the said 10th day of November, the said close had sowed with wheat and rye, which wheat and rye, 8 Maii, 37 Eliz. were grown into blades, the defendant, in consideration that the plaintiff, at the special instance and request of the said Humphrey, had bargained and sold to him the said blades of wheat and rye growing upon the said close, (the tithes due to the rector, &c. excepted) assumed and promised the plaintiff to pay him 16*l.* at the Feast of St. John the Baptist then to come: and for non-payment thereof at the said Feast of St. John Baptist, the plaintiff brought the said action: the

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defendant pleaded *non assumpsit modo et forma ;* and on the trial of this issue the jurors gave a special verdict, *sc.* that the defendant bought of the plaintiff the wheat and rye in blades growing upon the said close as is aforesaid, *prout* in the said declaration is alleged, and further found, that between the plaintiff and the defendant there was no other promise or assumption but only the said bargain ; and against the maintenance of this action divers objections were made by John Dodderidge of counsel with the defendant. 1. That the plaintiff upon this bargain might have ordinary remedy by action of debt, which is an action formed in the register, and therefore he should not have an action on the case, which is an extraordinary action, and not limited within any certain form in the register ; for *ubi cessat remedium ordinarium, ibi decurritur ad extraordinarium, et nunquam decurritur ad extraordinarium ubi valet ordinarium,* as appears by all our books ; *et nullus debet agere actionem de dolo, ubi alia actio subest.* The second objection was, that the maintenance of this action takes away the defendant's benefit of wager of law, and so bereaves him of the benefit which the law gives him, which is his birthright. For peradventure the defendant has paid or satisfied the plaintiff in private betwixt them, of which payment or satisfaction he has no witness, and therefore it would be mischievous if he should not wage his law in such case. And that was the reason (as it was said) that debts by simple contract shall not be forfeited to the King by outlawry or attainder, because then by the King's prerogative the subject would be ousted of his wager of law, which is his birthright, as it is held in 40 E. 3. 5 a. 50 Ass. 1. 16 E. 4. 4 b. and 9 Eliz. Dyer 262. and if the King shall lose the forfeiture and the debt in such case, and the debtor by judgment of the law shall be rather discharged of his debt, before he shall be deprived of the benefit which the law gives him for his discharge, although in truth, the debt was due and payable ; *a fortiori* in the case at Bar, the defendant shall not be charged in an action in which he shall be ousted of his law, when he may charge him in an action, in which he may have the benefit of it : and as to these objections, the Courts of King's Bench and Common Pleas were divided ; for the Justices of the King's Bench held, that the action (notwithstanding such objections) was maintainable, and

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the Court of Common Pleas held the contrary. And for the honour of the law, and for the quiet of the subject in the appeasing of such diversity of opinions (*quia nil in lege intolerabilius est eandem rem diverso jure censeri*) the case was openly argued before all the Justices of England, and Barons of the Exchequer, *sc.* Sir John Popham, Knt. C.J. of England, Sir Edm. Anderson, Knt. C.J. of the Common Pleas, Sir W. Periam, Chief Baron of the Exchequer, Clark, Gawdy, Walmesley, Fenner, Kingsmill, Savil, Warburton, and Yelverton, in the Exchequer Chamber, by the Queen's Attorney-General for the plaintiff, and by John Dodderidge for the defendant, and at another time the case was argued at Serjeant's Inn, before all the said justices and Barons, by the Attorney-General for the plaintiff, and by Francis Bacon for the defendant, and after many conferences between the justices and Barons, it was resolved, that the action was maintainable, and that the plaintiff should have judgment. And in this case these points were resolved :—1. That although an action of debt lies upon the contract, yet the bargainor may have an action on the case, or an action of debt at his election, and that for three reasons or causes :—1. In respect of infinite precedents, (which George Kemp, Esq. Secondary of the Prothonotaries of the King's Bench shewed me) as well in the Court of Common Pleas as in the Court of King's Bench, in the reigns of King H. 6. E. 4. H. 7. and H. 8. by which it appears, that the plaintiffs declared that the defendants, in consideration of a sale to them of certain goods, promised to pay so much money, &c. in which cases the plaintiffs had judgment. To which precedents and judgments being of so great number, in so many successions of ages, and in the several times of so many reverend Judges, the justices in this case gave great regard ; and so the justices in ancient times, and from time to time did, as well in matters of form as in deciding of doubts and questions as well at the common law, as in construction of Acts of Parliament, and therefore in 11 E. 2. Formedon 32, it is held, that the ancient forms and manner of precedents are to be maintained and observed ; and in 34 Ass. 7. that which has not been according to usage shall not be permitted, and in 2 E. 3. 29. the ancient form and order is to be observed. In 39 H. 6. 30. the opinion of *Prisot' et tot' Cur'* was, that in a writ of mesne the plaintiff ought to surmise the

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tenure between the lord paramount and the mesne, as well as between the mesne and the tenant, and shew the divers reasons and causes of their opinions: but when the justices were informed by the prothonotaries, that the book called Les Tales, contained the form that had always in such cases been used, the book saith, that the justices resolved that they would not change the usage, notwithstanding their opinion was to the contrary, and according to the precedent they awarded the count good, 4 E. 4. 44. In a writ of error brought by John Paston, to reverse an outlawry against him, he did not surmise in the writ at whose suit he was outlawed, and all the justices said it was a strange writ, and no certainty supposed thereby; for by the writ it did not appear whether he was outlawed at the suit of the party or at the King's suit, or in what suit, or for what thing, and it might be that he was outlawed for felony, debt, trespass, account or fine to the King, but when the Court was informed that the ancient form was such, then they changed their opinion, and awarded the writ good, and resolved, that common course makes a law, although now as it was there said, perhaps reason willeth the contrary: but there the justices said, we cannot change the law now, for that would be inconvenient, and therewith agrees Long, 5 E. 4. 1. where it is said, that the course of a Court makes a law: *vide* Mich. 2 & 3 P. and M. 120. The statute of W. 2. cap. 12, *quod justic' coram quib' format' erit appellum et terminat'* shall enquire of damages where the defendant is acquitted, yet precedents expound the law against the express letter, *sc.* that Justices of Nisi Prius (before whom the appeal was not began) shall do it, and many others to this effect are in our books: but forasmuch as precedents are not always allowable, for in our books the Judges reject some precedents, see a notable case in Long, 5 E. 4. 110. for certain rules and differences, in this matter there it is agreed, that where a question was of a retorn of an assise, and two or three precedents were shewed, which agreed with the said retorn, and the justices said, that two or three retorns or precedents do not make a law, nor a custom, especially when there are here in Court forty and more precedents to the contrary: but if there was no precedent to the contrary, it was another matter, unless the Court adjudge it against reason, and then it shall be amended, for perhaps the precedents passed without

challenge of the party, or debate of the justices, as then (as it is there recited) of late it was in a writ of error to reverse an outlawry in the county of Lancaster, and the error was because the sheriff retorned, that *ad com' Lancastriæ tent' ibid'*, *&c.* where it should be, *ad com' Lancastriæ tent' apud Lancastr'*, or other certain place to which this word *ibid'* should have relation, and although there were shewed one hundred precedents according to the said retorn, yet the outlawry was reversed ; so that in divers cases precedents do not make a law ; and, therefore, it was said by the justices to the parties, that he who would have advantage of precedents, ought to search for them at his peril, and for his speed, for the Court would not search for them ; for if none, or no usual precedents are shewn, the Court ought to adjudge according to law and reason : out of which book, 1. It is to be observed, that two or three, or such small number of precedents, do not make a law against the generality of precedents in such case. 2. That the retorn of sheriffs or entries of clerks without challenge of the party, or consideration of the Court, being against common law and reason, are not allowable : but when the precedents are judicial, *sc.* where the justices, by divers succession of ages, have given judgment in actions there brought, it shall be intended that some of the counsel with the defendant, or some of the justices before whom the action was tried, and the record read, would have excepted against it, if in their judgment the action was not maintainable, but in case of return of an outlawry, or entries of clerks, the records pass in silence, and without exception of the parties, and therefore are not so authentic as judgments upon demurrers or verdicts, and therefore in such cases *multitudo errantium non parit errori patrocinium*, if such retorns or entries of clerks and officers are clearly in the opinion of the justices against law and reason : so that in the case at Bar it was resolved, that the multitude of the said judicial precedents in so many successions of ages, well prove that in the case at Bar the action was maintainable. The second cause of their resolution was divers judgments and cases resolved in our books where such action on the case on Ass. has been maintainable, when the party might have had an action of debt, 21 H. 6. 55 b. 12 E. 4. 13. 13 H. 7. 26. 20 H. 7. 4 b. and 20 H. 7. 8 b. which case was adjudged as Fitz James cites it, 22 H. 8. Dyer 22 b.

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27 H. 8. 24 & 25 in *Tatam's case, Norwood and Read's case,* adjudged Plowd. Com. 180. 3. It was resolved, that every contract executory imports in itself an *assumpsit,* for when one agrees to pay money, or to deliver any thing, thereby he assumes or promises to pay, or deliver it, and therefore when one sells any goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money as such a day, in that case both parties may have an action of debt, or an action on the case on *assumpsit,* for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case, as well as actions of debt, and therewith agrees the judgment in *Read and Norwood's case,* Pl. Com. 128. 4. It was resolved, that the plaintiff in this action on the case on *assumpsit* should not recover only damages for the special loss (if any be) which he had, but also for the whole debt, so that a recovery or bar in this action would be a good bar in an action of debt brought upon the same contract; so *vice versa,* a recovery of bar in an action of debt, is a good bar in an action on the case on *assumpsit. Vide* 12 E. 4. 13 a. 2 R. 3. 14. (32) 33 H. 8. Action sur le Case. Br. 105. 5. In some cases it would be mischievous if an action of debt should be only brought, and not an action on the case, as in the case *inter* Redman and Peck, 2 & 3 Ph. and Mar. Dyer 113. they bargained together, that for a certain consideration Redman should deliver to Peck twenty quarters of barley yearly during his life, and for non-delivery in one year, it is adjudged that an action well lies, for otherwise it would be mischievous to Peck, for if he should be driven to his action of debt, then he himself could never have it, but his executors or administrators, for debt doth not lie in such case, till all the days are incurred, and that would be contrary to the bargain and intent of the parties, for Peck provides it yearly for his necessary use: so 5 Mar. Br. Action sur le Case 108. that if a sum is given in marriage to be paid at several days, an action upon the case lies for non-payment at the first day, but no action of debt lies in such case till all the days are past. Also it is good in these days in as many cases as may be done by the law, to oust the defendant of his law, and to try it by the country, for otherwise it would be occasion of much perjury. 6. It was said, that an action on the case on *assumpsit* is as well a formed

action, and contained in the register, as an action of debt, for there is its form: also it appears in divers other cases in the register, that an action on the case will lie, although the plaintiff may have another formed action in the register; F. N. B. 94 g. and Register 103 b. If a man has a manor within any honour, and has a leet within his manor of his tenants, if he or his tenants are distrained by the lord of the honour, to come to the leet of the honour, he who is so distrained may have a general writ of trespass, or a special writ upon his case: so if any officer takes toll of him who ought to be quit of toll, he shall have a general writ of trespass, or an action upon his case, as appears by Fitz. *ib.* 94. And if a prior or other prelate, is riding in his journey, and one distrains his horse upon which he is riding when he may distrain other goods, he may have a general action of trespass, or an action upon his case, as appears in the Register, 100 b. and F. N. B. 93. H. If the sheriff suffers one in execution upon a statute merchant to escape, the conusee may have an action of debt, or an action on the case, as appears by the Register, 98 b. and F. N. B. 93 B. C. So if a man ousts the executors of his lessee for years of their term, they may have a special writ upon their case, as appears F. N. B. 92. G. and Register 97. and yet they may have *ejectione firmæ*, or trespass. And therefore it was concluded, that in all cases when the register has two writs for one and the same case, it is in the party's election to take either. But the register has two several actions, *sc.* action upon the case upon *assumpsit*, and also an action of debt, and therefore the party may elect either. And as to the objection which has been made, that it would be mischievous to the defendant that he should not wage his law, forasmuch as he might pay it in secret: to that it was answered, that it should be accounted his folly that he did not take sufficient witnesses with him to prove the payment he made: but the mischief would be rather on the other party, for now experience proves that men's consciences grow so large that the respect of their private advantage rather induces men (and chiefly those who have declining estates) to perjury; for *jurare in propria causa* (as one saith) *est sæpenumero hoc seculo præcipitium diaboli ad detrudendas miserorum animas ad infernum;* and therefore in debt, or other action where wager of law is admitted by the law, the Judges without good admonition and

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due examination of the party do not admit him to it. And as to the case which was cited, that debts or duties due by single contract where the party may wage his law, shall not be forfeited by outlawry, because the debtor will be thereby ousted of his law: to that it was answered by the Attorney-General that in such case by the law, debts or duties shall be forfeited to the King, and so are the better opinions of the books, *sc.* 3 E. 3. Corone 343. 19 E. 2. Avowry 223. If the tenant of a prior alien is amerced for default of suit to the court-baron, the King seises the possessions of the prior alien, he shall have this debt due for the amercement; yet in an action of debt brought for it by the prior alien, he shall have his law, as it was adjudged 6 E. 6. in Serjeant Bendloe's Reports, 28 E. 3. 92. in Accompt, and Stamf. Pleas of the Crown 188. and infinite precedents in all ages in the Exchequer, which I have seen, approve it, and so it was now lately resolved in the Exchequer, and so it was held in this case by Popham, Anderson, and divers other justices with whom I have conferred against the sudden opinions in 49 E. 3. 5. 50 Ass. 1. 16 E. 4. 4. and 9 Eliz. 262. and so you have a doubt in our books well resolved. *Et nota* reader, in every *quo minus* in the Exchequer brought by the King's debtor against one who is indebted to him on a simple contract, the defendant shall not have his law, for the benefit of the King, as appears in 8 H. 5. Ley 66. 20 E. 3. Ley. 42. 10 H. 7. 6., and yet there the King is not party, *a fortiori* when such debt or duty is forfeited to the King, and the King is the sole and immediate party: *et nota*, reader, this resolution as to this point, agrees with the judicial law of God, upon which our law is in this point grounded, for it appears by the 22d chapter of Exodus, ver. 7. *Si quis commendaverit amico pecuniam; &c. et ver.* 10. *Si quis commendaverit proximo suo asinum, bovem, ovem, et omne jumentum ad custodiam, et mortuum fuer', aut debilitatum, aut captum ab hostibus, nullusque hoc viderit, jusjurandum erit in medio quod non extenderit manum ad rem proximi sui, suscipietque Dominus juramentum et ille reddere non cogetur;* by which it appears that it is in the election of the plaintiff, either to charge the defendant by witnesses if he will, and to oust him of his law, or to refer it to the defendant's oath; for the text saith, *nullusque hoc viderit, sc.* if there be no witnesses: so by our law in the same case put in the text, the

owner has election either to bring an action on the case in which the defendant cannot wage his law, or an action of *detinue* in which he may, *et jusjurandum in hoc casu est finis;* for the plaintiff is bound thereby, and it is the end of the controversy. And I am surprised that in these days so little consideration is made of an oath, as I daily observe; *cum jurare per Deum actus religionis sit, quo Deus testis adhibetur tanquam is qui sit omnium rerum maximus, &c. Nota,* reader, for witnesses or acquittance (on oath). SLADE'S CASE.

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